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No. 10-10-745

In the Supreme Court of the United States

BRENDA URNIKIS-NEGRO,

Petitioner,

v.

AMERICAN FAMILY PROPERTY SERVICES, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 207(a)(2) of the Fair Labor Standards Act requires that a covered employee who works more than forty hours in a week be paid at a rate no less than one and one-half times the "regular rate" at which the worker is employed. The question presented is:

May the regular rate for an employee be calculated on a fluctuating workweek basis when the employer fails to satisfy the standards in the applicable fluctuating workweek regulation, 28 C.F.R. § 778.114?

PARTIES

The petitioner is Brenda Urnikis-Negro. The respondents are American Family Property Services, Inc., Nicole Lash and Todd Lash.

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Petitioner Brenda Urnikis-Negro respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on August 4, 2010.

OPINIONS BELOW

The August 4, 2010, opinion of the Court of Appeals, which is reported at 616 F.3d 665 (7th Cir. 2010), is set out at pp. 1a-47a of the Appendix. The July 21, 2008 order of the District Court, which is unofficially reported at 2008 WL 5539823 (N.D.Ill. July 21, 2008), is set out at pp. 48a-77a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on August 4, 2010. On October 22, 2010, Justice Kagan extended the time for filing a petition for writ of certiorari until December 2, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

Section 207(a)(2) of the Fair Labor Standards Act, 29 U.S.C. § 207(a)(2), provides in pertinent part:

> No employer shall employ any of his employees ... –

> (A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,
>
> (B) for a workweek longer than forty-two hours during the second year from such date, or
>
> (C) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 778.108 of 29 C.F.R. provides in pertinent part:

> The "regular rate" of pay under the Act cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee; it must be drawn from what happens under the employment contract (*Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446). The Supreme court has described it as the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed – an "actual fact" (*Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419)....

Section 778.113 of 29 C.F.R. provides in pertinent part:

> *Salaried employees – general.* (a) Weekly salary. If the employee is employed solely on a weekly salary basis, his regular rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. If the employee is hired at a salary of $182.70 and if it is understood that this salary is compensation for a regular workweek of 35 hours, the employee's regular rate of pay is $182.70 divided by 35 hours, or $5.22 an hour, and when he works overtime he is entitled to receive $5.22 for each of the first 40 hours and $7.83 (one and one-half times $5.22) for each hour thereafter. If an employee is hired at a salary of $220.80 for a 40-hour week his regular rate is $5.52 an hour.

Section 778.114 of 29 C.F.R. provides:

> *Fixed Salary for fluctuating hours.* (a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours

worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of these principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his

compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).

(c) The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as

> adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

STATEMENT OF THE CASE

The Fair Labor Standards Act provides that a covered employee who works more than 40 hours in a given week must be paid at a rate one and one-half times her "regular rate." For hourly employees the regular rate is the wage per hour they are paid for non-overtime work. When an employee is paid a salary, rather than being compensated based on an hourly rate, regulations issued by the Department of Labor establish standards for determining the "regular rate" to be used in calculating the overtime rate. In this case the court of appeals, declining to apply the controlling regulations, created a new overtime calculation system that results in overtime wages

that are a small fraction of what would normally be required. The decision below throws into disarray the overtime standards for salaried workers under the FLSA.

The plaintiff worked for the defendants in a largely clerical capacity from mid-2004 until the end of 2005. She earned a salary of $52,000 a year. Although plaintiff routinely worked more than 40 hours a week, in some periods as many as 66.5 hours in a single week, she was never paid any overtime. Plaintiff filed suit under the FLSA in 2006, seeking to recover the unlawfully withheld overtime payments plus an equal amount of liquidated damages.

The defendants contended that plaintiff held an administrative position and was therefore not covered by the FLSA. Following a bench trial, the district judge rejected that defense. (Pet. App. 12a). The judge found that the plaintiff had worked a total of 1490.5 hours of overtime for which she had never received additional overtime pay. (Pet. App. 10a). The court also concluded that the defendants had "recklessly disregarded their obligations under [the FLSA]," and thus were liable for liquidated damages. (Pet. App. 14a).

The remaining issue was the amount of overtime wages that plaintiff was owed for the 1490.5 hours of overtime. Plaintiff contended that her regular rate of pay was $25 an hour (the figure arrived at by dividing her $1000 weekly salary by 40 hours) and that she was therefore entitled to be paid $37.50 per hour for the overtime work ($25 multiplied by one and

one-half). The district judge, however, held that the overtime award should instead be based on the special "fluctuating workweek" standard set out in section 778.114 of the Department of Labor FLSA regulations, which provides in certain circumstances for a significantly lower overtime premium. 29 C.F.R. § 778.114. (Pet. App. 15a). The difference between these two methods of determining the unpaid overtime wages was substantial. If plaintiff had been awarded $37.50 per hour, her total recovery (including liquidated damages) would have been $111,787.50. Under the fluctuating workweek method used by the trial judge, however, plaintiff was awarded only $24,266, an average of $8.31 in overtime payment per overtime hour worked. (Pet. App. 17a).

The fluctuating workweek method, if applicable, reduces in two distinct ways the amount of overtime which an employer must pay. First, the "regular rate" for a plaintiff is determined, not by dividing the plaintiff's weekly salary by her regular nonovertime hours, but by dividing that weekly salary by the total hours worked in each week. Under this computation the regular rate can vary from week to week, and is smaller the more hours an employee works. For example, in a week during which a plaintiff earning $1000 a week worked 50 hours, her fluctuating workweek regular rate would be $20 an hour; if she worked 60 hours, her regular rate would fall to $16.67 per hour. Second, under this methodology a worker's salary for the week is deemed to already include straight time pay (i.e. pay at the regular rate)

for each of the overtime hours worked. Thus the additional overtime wage owed is only one-half of the regular rate, rather than the normal calculation of one and one-half times the regular rate. (See Pet. App. 14a-18a).

The issue on appeal was "a legal question" as to whether the fluctuating workweek method could be applied to plaintiff. (Pet. App. 4a). The court of appeals concluded that the district court had erred in holding that section 778.114 of the regulations could be relied on to justify a reduced overtime award. The Seventh Circuit reasoned, correctly, that the defendants had failed to satisfy the specific prerequisites spelled out in section 778.114 as conditions for using the fluctuating workweek method. (Pet. App. 3a, 26a-34a).

However, even though the defendants had not met the section 778.114 requirements for invoking the fluctuating workweek method, the court of appeals nonetheless held that application of that standard was proper. It reasoned that this Court's decision in *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942), compelled utilization of the fluctuating workweek method even when an employer has failed to meet the specific prerequisites established by section 778.114. (Pet. App. 3a, 21a-26a, 35a-36a, 38a).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Has Decided An Important Question of Law Regarding The FLSA Which Has Not Been, But Should Be, Settled by This Court

The overtime provision of the FLSA covers salaried workers as well as those paid on an hourly basis; applicability of the FLSA turns on the type of work an employee does, not on the manner in which he or she is paid.[1] For more than four decades the amount of overtime owed to salaried workers has been governed by detailed regulations issued by the Secretary of Labor in 1965. In the instant case the Seventh Circuit has established a dramatically different standard governing overtime for salaried workers. This new standard drastically reduces the amount of overtime pay due to such employees – in plaintiff's case slashing her overtime award by more than 78% – and that judicially fashioned standard would apply to most salaried employees. Certiorari should be granted to restore the longstanding regulatory scheme as the standard governing the overtime owed to salaried workers.

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[1] Section 213 of the FLSA exempts a number of categories of workers, such as those who are employed "in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).

A. The Labor Department Regulations Establish A Carefully Structured Scheme Governing Overtime for Salaried Workers

Section 207(a)(2) provides that any employee who works more than 40 hours in a week must be paid overtime at a rate no less than one and one-half times "the regular rate at which he is employed." 29 U.S.C. § 207(a)(2). The statute itself does not define "regular rate." Workers are compensated under a wide variety of methods. The Department of Labor has issued detailed regulations delineating the appropriate standard for determining the "regular rate" that is the basis for calculating overtime payments. 29 C.F.R. §§ 778.107 et seq. Since 1965 the regulations have dealt specifically with the regular rate of salaried workers, setting out a carefully structured scheme for determining that rate.

(1) The regular rate for many salaried workers is governed by section 778.113(a). Under that provision the regular rate is computed "by dividing the salary by the number of hours which the salary is intended to compensate." The employer and employee might understand that in return for her salary the employee was required each week to be at work (as is commonly the case) for 40 hours, or for a smaller or greater number of hours. In the instant case the plaintiff testified "that she expected to work a 40-hour week," and the co-owner of the firm testified "that all of the firm's employees were paid on the basis of a 40-hour week." (Pet. App. 37a).

In determining the divisor in the section 778.113 calculation, the touchstone is the intent of the parties, usually their intent when "an employee is hired," regarding the minimum number of hours the employee would be required to work. For many salaried workers, of course, how long they will work in a given week is governed by two distinct obligations, a requirement that they work a minimum number of hours (e.g., they must be at the office 40 hours a week) and a requirement that they complete certain tasks (e.g., they must type a given number of documents each week). In some instances the completion of the minimum tasks will keep them on the job for a period longer than the minimum hour requirement. But the standard for the regular rate under section 778.113 turns on the minimum hours that must be worked, not how many hours might be needed in any given week to complete the required tasks.

Two features of section 778.113 are of importance to its meaning and administrability. First, the regular rate does not depend on how fast a particular worker is able to complete the assigned tasks. If two secretaries are hired to do the same job at the same salary, their regular rate is the same even if one needs 50 hours a week to do all the assigned typing, while the other is able to finish in 45 hours. Second, the regular rate under section 778.113 does not vary with the ebb and flow of work that will often be common. Unlike other regulations, such as that governing the regular

rate for piecework, 29 C.F.R. § 778.111(a),[2] under section 778.113 the weekly salary is not divided by the often variable number of hours that were worked in any given week, but by a fixed number of hours based on the understanding of the parties as to when the employee must be at work.

(2) In the absence of any understanding between the employer and employee regarding the minimum hour requirement for the salaried position in question, the regular rate is governed by the default rule in section 778.108. That regular rate is based on the amount "actually paid the employee for the normal, nonovertime workweek." Thus if an employee usually works 35 hours in a week, the regular hourly rate would be calculated by dividing the weekly salary by 35. But if the employee normally works 45 or 50 hours, the salary is divided by 40, because that is the length of the "nonovertime workweek."

(3) Section 778.114 provides a special "fluctuating workweek" standard for determining the "regular rate" in certain narrowly defined circumstances. Where the specified prerequisites are met, an employer can choose to use a salary arrangement under which the salary is deemed payment at the regular

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[2] For piecework the regular rate is calculated by dividing "total earning for the workweek from piece rates" by "the number of hours worked in the week for which such compensation was paid."

rate for however many hours were worked in a given week. Under this arrangement the regular rate would be calculated separately for each week: the more hours the employee worked, the smaller the resulting regular rate for the week. This system allocates part of the worker's salary to the overtime hours as well as to the nonovertime hours. Thus in order to meet the required time and one-half overtime rate, an employer need pay only an additional half-time amount for each overtime hour.

Because utilization of the fluctuating workweek method substantially reduces overtime pay, the regulations impose stringent limitations on its use. An employer may rely on this method only if five conditions are met. First, there must be a "clear understanding" between the employee and employer that the salary constitutes "straight-time compensation" for the entire period worked, and that it is "apart from overtime premiums." 29 C.F.R. § 778.114(a) and (b). Second, the worker must contemporaneously "receive extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay." 29 C.F.R. § 778.114(a). Third, there must be an understanding that the salary will be paid even in a workweek when a full schedule of hours is not worked. 29 C.F.R. § 778.114(c). Fourth, the worker's hours must "fluctuate from week to week." 29 C.F.R. § 778.114(c). Fifth, the salary must be great enough to be no less than the minimum wage rate for those workweeks in which the hours worked are the highest. *Id.*

Section 778.114 is particularly emphatic that the fluctuating workweek method may not be used if an employer fails to contemporaneously pay the employee the additional half-time premium.

> [W]here all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on *any* application of the fluctuating workweek overtime formula.

29 C.F.R. § 778.114(c) (emphasis added). An employer who pays an employee only his or her regular salary, and no more, when the employee works overtime is expressly forbidden to calculate the overtime premium due based on the fluctuating workweek method.

Under the overall regulatory scheme, unless an employer has satisfied the requirements of section 778.114, the regular rate for a salaried employee must be computed under either section 778.113 or section 778.108.

B. The Court of Appeals Has Vitiated The Applicable Regulatory Scheme

The decision of the court of appeals lays waste to this entire regulatory scheme. Without regard to the regulations which define the regular rate of a salaried employee, an employer in almost any case may invoke the fluctuating workweek standard to severely reduce the amount of back wages awarded for overtime. Save

in exceptional circumstances, a salaried worker can no longer obtain traditional time and one-half overtime in the Seventh Circuit.

The court of appeals correctly held that the employer in this case had failed to meet the requirements of section 778.114. First, the employer did not pay the requisite half-time premium in the period when the plaintiff worked overtime. "[Section 778.114] plainly envisions the employee's contemporaneous receipt of a premium ... for any overtime work he has performed." (Pet. App. 32a). "Plainly the employee has not received such extra compensation ... [I]n this case, her employer ... has never separately paid her for overtime." (Pet. App. 33a). Second, there was no understanding that the plaintiff's salary constituted straight time wages for her regular and overtime hours, to be supplemented by overtime premiums. To the contrary, as the court of appeals repeatedly noted, both the plaintiff and the employer understood that her salary was all she would ever be paid; under their understanding the salary was not merely straight time pay and there were never to be any additional payments for her hundreds of overtime hours.

Having correctly concluded that section 778.114 did not authorize use of the fluctuating workweek method, the court of appeals, "[s]etting the Department of Labor's rule aside" (Pet. App. 34a), proceeded to hold that the fluctuating workweek method was nonetheless controlling. That standard for determining the regular rate and amount of overtime premium

owed, it held, was "dictate[d]" by the simple fact that plaintiff's wage was intended as the sole compensation "for any and *all* hours that she worked in a given week." (Pet. App. 38a) (emphasis in original). As the Seventh Circuit made clear, the employer-friendly fluctuating workweek rule is to be applied in any case in which there is "no additional payment for overtime hours." (Pet. App. 39a (quoting *Zoltek v. Safelite Glass Corp.*, 884 F.Supp. 283, 287 (N.D.Ill. 1995)); see Pet. App. 39a (fluctuating workweek standard applies because of the agreement was that workers were not "entitled to overtime pay")).

Thus under the Seventh Circuit standard the very act of refusing to pay any overtime automatically triggers application of the fluctuating workweek method. This straightforward legal rule sweeps aside the entire regulatory scheme. It is ordinarily the case that a worker's salary is understood by the employer and employee alike to be the only compensation that will be paid, regardless of how many hours the employee may work. By refusing to pay any overtime an employer falls under the special fluctuating workweek standard, and need only pay an additional half-time for hours worked in excess of forty. The only employers which must pay time and one-half for overtime work are those that have chosen to pay some overtime. An employer that pays a single cent in overtime is subject to the requirement of overtime at the time and one-half rate, but an employer which pays no overtime at all is subject to the much lower fluctuating workweek overtime rate.

The Seventh Circuit decision is clearly inconsistent with the terms of section 778.114. First, section 778.114(c) expressly states that if an employer has failed to contemporaneously pay an additional half-time premium, "compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula." The Seventh Circuit standard thus mandates utilization of that formula in the precise circumstance in which that use is expressly forbidden by section 778.114(c). Second, section 778.114 itself requires that an employer pay the additional half-time premium at the time when the employee does the work; under the Seventh Circuit standard, on the other hand, "courts fill in that piece of the [fluctuating workweek] formula by making the premium part of the damages award." (Pet. App. 32a).[3] Third, the Seventh Circuit requires use of the fluctuating workweek standard if an employee understands that her salary will be her sole compensation and that she is not to receive any form of overtime payment. But that is precisely the sort of understanding that would bar use of the fluctuating workweek standard under section 778.114, because it would preclude a showing of the understanding required by the regulation itself, an understanding that the salary was only straight time, to be supplemented

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[3] Pet. App. 36a ("The overtime premium can and will be awarded by the court retroactively"), 44a ("the employer receives the benefit of [section 778.114] without having ever paid the employee contemporaneously for her overtime work").

with an overtime payment of at least an additional half-time.

The Seventh Circuit decision is inconsistent as well with section 778.113. The section 778.113 standard for computing a regular rate could only be applied, the court of appeals held, if an employee (whatever her understanding when hired as to the minimum hours she was required to work) actually worked only "a set number of hours." (Pet. App. 21a; see *id.* (section 778.113 can be applied if an employee "routinely work[s]" the same number of hours every day)). At the least that means that section 778.113 cannot be used if an employee works overtime hours more than infrequently.

The Seventh Circuit's presumptive use of the fluctuating workweek method in any case in which an employer pays no overtime to salaried workers unquestionably defeats a central purpose of the statute. A key goal of the FLSA requirement of time and one-half overtime wages is to make use of overtime *more* expensive than straight time, and thus to create a financial incentive for employers to hire a larger number of workers rather than require their existing workforce to work longer hours. "[B]y increasing the employer's labor costs by 50% at the end of the 40-hour week and by giving the employees a 50% premium for all excess hours, Section 7(a) achieves its dual purpose of inducing the employer to reduce the hours of work and to employ more men and of compensating the employees for the burden of

a long workweek." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 423-24 (1945).

As the court of appeals frankly conceded, however, use of the fluctuating workweek method for salaried employees who receive no overtime will create

> exactly the opposite incentive, for as the workweek lengthens, the employer is paying [the worker] less per hour in straight-time pay and owes [the worker] a correspondingly smaller overtime premium for each hour of work over 40. In short, the hourly cost of labor ... decreases the longer the employee is required to work.

(Pet. App. 45a). As the table in the appendix makes clear, under the Seventh Circuit rule paying existing employees to work overtime is always less expensive than hiring new workers at straight time rates. If the defendants in this case had required the plaintiff to work 80 hours a week, it would have cost them only an additional $250 a week in premium pay. Hiring a new employee (at straight time rates) to do that same additional 40 hours of work, on the other hand, would have cost $1000 a week.

The effect of the decision below is thus to exempt most employers in the Seventh Circuit from the requirement that they pay ordinary time and one-half overtime to salaried employees, and to encourage employers in that circuit to increase the use of overtime rather than hire additional employees. The

small fluctuating workweek overtime premium is so small that, even if doubled by the addition of liquidated damages, the resulting cost per hour is *still* less than hiring a new worker. Thus today in the Seventh Circuit it often makes sense for an employer to pay no overtime at all to salaried workers, in knowing violation of the FLSA. Even if the violation is detected, paying the resulting damage award will be cheaper than having hired a new worker. This is a far cry from the regime envisioned by the framers of the FLSA. Were overtime computed in the usual manner at the time and one-half rate, unpaid overtime and liquidated damages would be three times the hourly cost of hiring a new worker, a powerful deterrent to violations of the law.

The court of appeals' adoption of this perverse legal standard occurs at the worst possible point in the nation's economic history, at a time when the country remains in the throes of the most serious recession since the Depression era. This is an issue of pivotal importance to the Fair Labor Standards Act, and one that should be addressed by this Court.

II. The Decision of The Court of Appeals Is Clearly Incorrect

The Seventh Circuit reasoned that even in cases where utilization of the fluctuating workweek method is not authorized (or is even forbidden) by section 778.114, that method is still required by *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572 (1942). (Pet. App. 38a). The court of appeals read *Missel* to

hold that whenever a salaried worker is denied overtime, the fluctuating workweek method must be used. The worker's regular rate is to be determined by dividing her salary by the total of all hours worked, straight time and overtime. Once the regular rate is determined in that manner, the court below reasoned, *Missel* dictates that the amount of overtime due is only a half-time payment, since straight time wages for the overtime hours were already included in the salary. (Pet. App. 24a-25a).

But this Court's decisions in the years since *Missel* have not adhered to this approach. To the contrary, only two years after *Missel* this Court announced a different general rule for determining a worker's regular rate. "While the words 'regular rate' are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek." *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 38, 40 (1944). The Court reiterated the *Helmerich* standard in a series of subsequent opinions. *United States v. Rosenwasser*, 323 U.S. 360, 363-64 (1945) (quoting *Helmerich*); *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945) ("the regular rate refers to the hourly rate actually paid the employee for the normal, non-overtime workweek"); *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 204 (1947) (quoting *Helmerich*); *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 461 (1948) (quoting *Helmerich*).

The standard in *Helmerich* and its progeny is obviously different than the standard utilized earlier

in *Missel*. Under the *Helmerich* definition of regular rate, the regular hourly rate of the plaintiff in this case would be $25, because in a nonovertime workweek, plaintiff would have been paid a weekly salary of $1000, and would have worked 40 hours.

The Labor Department regulations represent a sensible method of reconciling *Helmerich* and *Missel*. Section 778.108 sets out the general nonovertime workweek standard in *Helmerich*. Section 778.113 recognizes that an employer and employee may agree on a particular minimum number of hours that the employee is required to work to earn her salary, even though in any given week the press of business might necessitate longer hours; where such an agreement exists, section 778.113 directs use of that stipulated minimum period of hours as the basis of the regular rate calculation. Section 778.114 delineates a narrow category of cases in which an employer can use the sort of fluctuating workweek method that was described by *Missel* but that would be inconsistent with *Helmerich* and its progeny. Section 778.114 provides a degree of flexibility to employers whose employees work irregular schedules, without permitting such a broad use of the fluctuating workweek method as to emasculate sections 778.108 and 778.113 and to leave little or no room for application of the general rule in *Helmerich*.

The court of appeals also argued that the limitations in section 778.114 should be irrelevant here because the issue in the instant case is not whether there is a current violation (or there would be a current violation if plaintiff still worked for the

defendants), but only what remedy should be provided for a past violation. On this reasoning, although a half-time overtime payment for current work would be too small to *comply* with the FLSA, a damage award in that amount is nonetheless a sufficient *remedy* for that very violation. That simply makes no sense. The applicable regulation establishing how much overtime should have been paid when plaintiff worked for the defendants must also control the amount of unpaid overtime that plaintiff is now due. The district court found that plaintiff was owed overtime wages for the period when she worked for the defendants. Because section 778.114 did not apply to plaintiff during that period of employment, the applicable overtime rate must be determined under either section 778.113 or 778.108. Under either regulation plaintiff's regular rate was $25 an hour, and the time and one-half overtime rate was thus $37.50. The proper remedy for failing to pay $37.50 per hour in overtime cannot be damages calculated at a far lower rate, averaging in the instant case only $8.31 per hour.

CONCLUSION

Having acknowledged, with considerable understatement, that its analysis "[s]et[ ] the Department of Labor's rule aside," the Seventh Circuit's opinion closes with a surprising assertion that the court has merely construed the FLSA "as ... the Department of Labor ha[s] interpreted it." (Pet. App. 46a). If the resulting construction tends to defeat the purpose of

the statute, the appellate court admonished, that was an objection "better addressed to Congress and the Secretary of Labor." *Id.* But the plain language of the Department's regulations – particularly section 778.114(c) – is clearly contrary to the decision of the court of appeals.

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit. In the alternative, the Solicitor General should be invited to submit a brief expressing the views of the United States.

Respectfully submitted,

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BRENDA URNIKIS-NEGRO, Plaintiff-Appellant, v. AMERICAN FAMILY PROPERTY SERVICES, et al., Defendants-Appellees.

No. 08-3117

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

616 F.3d 665; 2010 U.S. App. LEXIS 16126; 160 Lab. Cas. (CCH) P35,794; 16 Wage & Hour Cas. 2d (BNA) 803

September 11, 2009, Argued

August 4, 2010, Decided

COUNSEL: For BRENDA URNIKIS-NEGRO, Plaintiff-Appellant: Aaron B. Maduff, Attorney, MADUFF & MADUFF, LLC, Chicago, IL.

For AMERICAN FAMILY PROPERTY SERVICES, INCORPORATED, NICOLE LASH, TODD LASH, Defendants-Appellees: Charles L. Bretz, Joseph A. Namikas, Attorneys, BRETZ & ASSOCIATES, Joliet, IL.

JUDGES: Before BAUER, ROVNER and WILLIAMS, Circuit Judges.

OPINION BY: ROVNER

OPINION

ROVNER, Circuit Judge. Although plaintiff Brenda Urnikis-Negro prevailed in her suit for overtime pay, she contends on appeal that the district

court improperly calculated the amount of pay she is owed. After a bench trial, the district court found that defendants American Family Property Services and its owners and officers, Todd and Nichole Lash, violated the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201, et seq. ("FLSA"), when they mistakenly treated Urnikis-Negro as an administrative employee who was exempt from the overtime provisions of the statute. *Urnikis-Negro v. Am. Family Prop. Servs., Inc.*, No. 06 C 6014, 2008 U.S. Dist. LEXIS 102034, 2008 WL 5539823, at *5-*9 (N.D. Ill. Jul. 21, 2008); *see* 29 U.S.C. §§ 207, 216(b). The FLSA sets the standard workweek at 40 hours and requires employers to pay their non-exempt employees one and one-half times their regular rate of pay for any hours worked in excess of 40. § 207(a)(1). Urnikis-Negro was never paid anything above her fixed salary for her overtime hours.

However, in calculating Urnikis-Negro's regular rate of pay and thence the overtime to which she was entitled, the court used the fluctuating workweek ("FWW") method set forth in 29 C.F.R. § 778.114(a), an interpretive rule promulgated by the Department of Labor. 2008 WL 5539823, at *11-*12. The FWW method calculates an employee's regular rate of pay by dividing her weekly wage by the total number of hours she works in a given week rather than by 40. Where, as here, the employee regularly works more than 40 hours per week, the FWW method results in both a lower regular rate of pay and a significantly lower award of overtime pay. The propriety of relying

on section 778.114(a) and the FWW method in cases where the plaintiff has been miscategorized by her employer as exempt from the FLSA's overtime provision has divided the federal courts.

We agree that section 778.114(a) itself does not provide the authority for applying the FWW method in a misclassification case. That rule sets forth one way in which an employer may lawfully compensate a nonexempt employee for fluctuating work hours; it is not a remedial measure that specifies how damages are to be calculated when a court finds that an employer has breached its statutory obligations.

Irrespective of the rule, however, it was appropriate for the district court to apply the FWW method in this case. The authority to do so is found in the Supreme Court's decision in *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 62 S. Ct. 1216, (1942), superseded on other grounds by statute as stated in *Trans World Air Lines, Inc. v. Thurston*, 469 U.S. 111, 128 n.22, 105 S. Ct. 613, 625 n.22, (1985), which approved this very method of calculating of an employee's regular rate of pay and corresponding overtime premium. We therefore affirm the district court's judgment.

I.

Our summary of the facts is taken largely from the district court's own factual determinations. Although we have not been provided with a complete record of the testimony and other evidence presented

at trial, the district court's findings of fact are not challenged in this appeal; the appeal instead presents a legal question as to the proper determination of Urnikis-Negro's regular rate of pay and the overtime premium to which she is entitled.

American Family Property Services ("AFPS") was a real estate appraisal firm owned by Todd and Nicole Lash, who are husband and wife. Real estate appraisers are licensed by the State of Illinois. Todd Lash became licensed as an associate appraiser (which required him to complete specified training and pass a state examination) in the late 1990s and became a certified appraiser (which required experience as an associate appraiser, additional training, and a satisfactory score on another examination) in or about 2000. In 2003, the Lashes formed the firm Epic Appraisal, which later became AFPS. Lenders retained AFPS to conduct appraisals of residential properties on which they were considering making mortgage loans.

As of early 2004, Todd Lash was the sole certified appraiser at AFPS, although the firm also contracted with certified appraisers outside of the firm on occasion. Lash worked with a number of associate appraisers, some of whom were employed by AFPS and others of whom were independent appraisers who worked with AFPS on a contract basis. Typically, the associate appraisers prepared the appraisal reports for Lash's review. If and when Lash approved the report, he forwarded it to the lender that had retained AFPS to undertake the appraisal.

AFPS hired Urnikis-Negro in July 2004. Urnikis-Negro was a member of the religious congregation of which Lash was the pastor. One of her brothers already worked for AFPS as an associate appraiser, and a second brother would later join the firm. The firm's business was growing, and Lash wanted help in reviewing the reports prepared by the associate appraisers so that he could devote less time to AFPS and more time to his religious work: "It was my intention at that point to reduce my role in the company because . . . I wanted to be a pastor who appraised on the side and not an appraiser who pastored on the side." R. 98 at 8. Urnikis-Negro had no experience in real estate appraisals. At the time she was hired by AFPS, she had been working as the office manager of the loan department at LaSalle State Bank. Lash advised Urnikis-Negro that he would train her so that she could provide the assistance he sought in reviewing the appraiser reports. He also offered to pay for appraiser training so that she could eventually become an associate appraiser.[1]

Lash agreed to pay Urnikis-Negro an annual salary of $ 52,000. At that time, this was the highest salary paid to anyone working at AFPS – as high as the salary Lash himself was paid. It also represented a substantial increase from the pay Urnikis-Negro had received during her employment with the bank.

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[1] During her tenure with the firm, Urnikis-Negro did manage to earn her associate appraiser's license.

As the district court noted, the substantial pay reflected Lash's need to have someone at AFPS who could devote her attention to the more time-consuming aspects of the work he had been performing for the firm and thus free up time for him.

Urnikis-Negro understood that she was to be an employee of AFPS, and the district court found that this was an understanding shared by AFPS itself. 2008 WL 5539823, at *2. Nonetheless, when Urnikis-Negro received her first paycheck from AFPS, she discovered that the firm had paid her as if she were an independent contractor, withholding nothing from her pay for income or Social Security taxes. After she objected, the firm began making the appropriate withholdings. The district court found that AFPS's initial failure to withhold taxes was not only contrary to the understanding between the firm and Urnikis-Negro that she was an employee but amounted to a deliberate effort to circumvent the firm's legal obligations to withhold taxes from her pay. *Id.*

Lash and Urnikis-Negro did not discuss the number of hours she would be expected to work when he hired her. Although the district court credited Urnikis-Negro's testimony that she expected to work a 40-hour week. *Id.* at *2, it found that she also understood that her salary was to cover whatever time she was called upon to work in a given week. *Id.* at *12. Her job with the firm was task-oriented, and her hours were likely to fluctuate with the volume of the firm's appraisal business. Yet, Lash testified at his deposition that all of the firm's employees were

paid on the basis of a 40-hour week. The district court found it to be a fair inference from his testimony that Lash recognized the firm's obligation to pay a premium to any employee who was not exempt from the overtime provisions of the FLSA for any hours worked in excess of 40 per week. *Id.* at *2.

After a few weeks of shadowing Lash to become familiar with what he looked for in reviewing the reports prepared by associate appraisers, Urnikis-Negro began to work without direct supervision. Much of her work was clerical in nature: she filed appraisal reports, answered the telephone, called mortgage brokers and lenders to solicit new business using a list supplied by Lash, and pursued outstanding balances owed on appraisals AFPS had completed. She also fielded calls from brokers and lenders inquiring about the status of pending appraisals, noting errors or deficiencies in reports that the firm had prepared, or in some instances rejecting an appraisal outright. In each instance, Urnikis-Negro would report the call to the appropriate appraiser. More substantively, Urnikis-Negro reviewed draft reports prepared either by the firm's associate appraisers or by outside appraisers with whom the firm had contracted. Her job was to check the reports for any errors or inconsistencies and to ensure that they conformed to the requirements of the lender or broker who had ordered the appraisal. With respect to this aspect of her work, the district court found:

> Urnikis-Negro's work in this regard largely consisted of that of a glorified

> proofreader. Her responsibility in reviewing the appraisal reports was to make sure that all the necessary parts of the report form were filled in, the form did not contain facially apparent errors, and it did not have internal inconsistencies. In addition . . . on some occasions Urnikis-Negro was responsible for communicating to the appraiser deficiencies that had been noted by the mortgage lender. These duties, which took up the majority of the time Urnikis-Negro spent on the job, did not involve the exercise of discretion or judgment on her part. Rather, Urnikis-Negro simply ensured that forms had been filled out correctly, completely, and without errors. Any discretion or judgment exercised in connection with the appraisal forms was exercised by the appraiser, who had ultimate responsibility (both practically and legally) for everything in the appraisal report.

Id. at *3. The court acknowledged that some of what Urnikis-Negro did with respect to the firm's appraisals involved more than mere proofreading. Beyond making sure that the reports were complete and accurate, she was responsible for identifying any problems that might emerge when a lender reviewed the report. But her obligation was limited to identifying such potential problems and communicating them to the appraiser. *Id.* Similarly, although Urnikis-Negro occasionally suggested potential comparable properties that an appraiser might use to establish the value of the property being appraised, it was not her responsibility to make these suggestions and it was

the appraiser who decided whether to accept her suggestion and to determine what comparable properties to include in the report. *Id.* at *4.

> In sum, neither AFPS nor Todd Lash hired Urnikis-Negro to exercise judgment or discretion in connection with appraisals or otherwise. Rather, Lash and the company expected her, with regard to appraisal reports, to perform only the essentially ministerial function of reviewing the completeness and internal consistency of draft appraisal reports, and to note for the appraiser areas in which Lash or the lender might question the report.

Id. Finally, all reports were reviewed and approved by a certified appraiser – usually Todd Lash, but in some instances another individual. Urnikis-Negro was given the authority to affix the electronic signature of the certified appraiser once the appraiser approved the report. But she was only exercising the appraiser's authority in performing this task.

Given the large volume of business that the firm was handling in 2004 and 2005, Urnikis-Negro's work hours substantially exceeded 40 per week. Unfortunately, the parties kept no records of her actual hours, so "[t]he [c]ourt [was] left to determine by inference and circumstantial evidence how many overtime hours Urnikis-Negro worked." *Id.* at *10.[2]

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[2] Reasonable approximations of this sort are appropriate. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88,

(Continued on following page)

After weighing the conflicting testimony of the parties' witnesses on this point – much of which the court deemed incredible – the district court found by a preponderance of the evidence that Urnikis-Negro worked, on average, 12 hours per day, five days per week from the time her employment began in July 2004 through the end of June 2005, and 10 hours per weekday from July 2005 through December 2005, when the company's business slowed. *Id.* at *11. The court found further that Urnikis-Negro typically worked an additional six and one-half hours every other weekend throughout the period of her employment with AFPS. *Id.*

Those findings led the court to conclude that Urnikis-Negro worked a total of 1,490.5 hours of overtime over the course of her employment with AFPS. Specifically: (1) for the 24 weeks in the period from July 2004 through June 2005 when Urnikis-Negro worked an extra 6.5 hours over the weekend, she worked a total of 66.5 hours per week, which meant that she worked 26.5 hours of overtime per week, for a total of 636 overtime hours; (2) for the remaining 25 weeks in that same period, when she did not work over the weekend, Urnikis-Negro worked a total of 60 hours per week, meaning that

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66 S. Ct. 1187, 1192, 90 L. Ed. 1515 (1946), superseded on other grounds by statute as stated in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 41, 126 S. Ct. 514, 527, 163 L. Ed. 2d 288 (2005); *Brown v. Family Dollar Stores of Ind., LP*, 534 F.3d 593, 595 (7th Cir. 2008); *Wirtz v. Turner*, 330 F.2d 11, 13 (7th Cir. 1964).

she worked 20 hours of overtime per week, for a total of 500 hours of overtime; (3) for 14 weeks during the period from July 2005 through December 2005, as her time began to drop off, Urnikis-Negro worked 50 hours per week, with no weekend work, meaning that she worked 10 hours of overtime per week for a total of 140 hours of overtime; and (4) for the remaining 13 weeks in that same time period, when Urnikis-Negro worked another 6.5 hours over the weekend, for a total of 56.5 hours per week, with 16.5 hours of that sum being overtime work, for a total of 214.5 overtime hours. *See Id.* at *11, *12. However, Urnikis-Negro was never paid anything over and above her regular weekly salary for these overtime hours. (For her part, Urnikis-Negro never asked for overtime pay while she was in AFPS's employ; her desire was to work fewer hours rather than to make more money. She testified that she made that known to multiple individuals at AFPS, but her complaints fell on deaf ears.)

Urnikis-Negro left the employ of AFPS in late December 2005, when she was terminated. By that time, the volume of the firm's business had shrunk considerably (Todd Lash had had his license suspended indefinitely by the Illinois Department of Financial and Professional Regulation in May 2005) and the firm could no longer afford her services. She found a new position with a bank.

Urnikis-Negro subsequently filed suit against AFPS and the Lashes seeking unpaid overtime compensation pursuant to the FLSA, *see* 29 U.S.C.

§ 216(b), and the Illinois Minimum Wage Law, 820 ILCS 105/1, et seq., along with payment for unused vacation time pursuant to the Illinois Wage Payment and Collection Act, 820 ILCS 115/1, et seq. The court would later find in favor of the defendants on the claim for vacation pay, and that finding is not contested on appeal. As to the claims for overtime pay, the defendants contended that they owed no such additional pay to Urnikis-Negro on the premise that she was "employed in a bona fide . . . administrative . . . capacity" as defined by the Secretary of Labor and was therefore exempt from the overtime provisions of the FLSA and the state statute. 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.202; 820 ILCS 105/4a(2)(E).

In view of the evidence presented at trial, the district court found that AFPS had failed to prove that it employed Urnikis-Negro in a bona fide administrative capacity. The pertinent regulation specifies that in order for a worker to be deemed employed in a bona fide administrative capacity, the performance of her primary duty must demand the exercise of discretion and independent judgment on matters of significance. 29 C.F.R. §§ 541.200(a)(3), 541.202(a). But Urnikis-Negro did not exercise discretion and independent judgment in the performance of her primary duty with AFPS: "[She] neither made decisions about the firm's appraisals (or otherwise) and did not have authority to do so. Rather, she essentially proofread or checked the work of others and pointed out possible errors or omissions." 2008 WL 5539823, *Id.* at *8. To the extent she made suggestions to appraisers

about possible comparable properties, these were nothing more than suggestions; the appraisers themselves had sole control over the contents of their reports. *Id.* Thus, although her work related to a core function of the firm and may have had a substantial effect on its business, her role was not "administrative" in the sense defined by the Secretary of Labor. *Id.* She was therefore not exempt from the FLSA's overtime compensation mandate and was entitled to pay over and above her weekly salary for the overtime hours she worked while in AFPS's employ. *Id.* at *9. The court found further that the defendants in failing to pay Urnikis-Negro overtime had acted in reckless disregard of their obligations and her rights under the FLSA, a finding of willfulness which enabled her to recover unpaid overtime for up to three years in advance of the date she filed suit – enough to cover the entire period of her employment with AFPS. *Id.*; *see* 29 U.S.C. § 255(a).

The FLSA entitles covered employees to overtime compensation at one and one-half times their regular hourly pay for any hours in excess of 40 per week. § 207(a)(1); 29 C.F.R. § 778.107. On the premise that her weekly salary of $ 1,000 was meant to compensate her solely for 40 hours of work, Urnikis-Negro contended that her regular hourly wage was $ 25.00, and that she was therefore entitled to overtime compensation at the rate of $ 37.50 per hour. However, because the court found that Urnikis-Negro understood at the time of her hiring that her fixed salary was intended to cover *all* of the hours she worked,

even if they exceeded 40 hours per week, the court instead turned to section 778.114(a) and the FWW method set forth therein to calculate her regular hourly rate and overtime premium. As we discuss in greater detail below, section 778.114(a) recognizes the ability of an employer and an employee whose weekly hours fluctuate to agree that a fixed salary amount will serve as the employee's regular rate of compensation or "straight-time" pay (i.e., apart from overtime premiums) for any and all hours the employee works in a given week, regardless of their number. The employee's regular hourly wage will thus vary from week to week, rising and falling depending on the number of hours she works in a given week (with the statutory minimum wage constituting a floor). For any week in which the employee works more than 40 hours, the employer will still owe the employee an overtime premium. But because the fixed salary is meant to cover the regular rate of pay for *all* hours worked, the employer will owe the employee only half of the regular rate for any hours in excess of 40, rather than time *plus* one-half, since by agreement she has already been paid her regular rate for the overtime hours. *See* § 778.114(a).

Urnikis-Negro had argued in advance of trial that it would be inappropriate to rely on the FWW method in calculating her damages when AFPS had miscategorized her as exempt from the overtime requirements of the FLSA and had never contemporaneously paid her any overtime premiums when she worked more than 40 hours in a given week. R. 66,

67. The district court rejected her arguments in this regard, R. 71; 2008 WL 5539823, at *11, taking its cue from several circuits which have, largely on the authority of section 778.114(a), applied the FWW method in cases where the employers have erroneously treated the plaintiffs as exempt from the statute's overtime requirements. The court found it sufficient that "there was a 'clear mutual understanding between Urnikis-Negro and Todd Lash that her fixed salary of $ 1,000 per week or $ 52,000 per year was to serve as her compensation, apart from overtime premiums, for whatever number of hours she worked each week, rather than for working 40 hours or some other fixed period." 2008 WL 5539823, at *12 (citing *Valerio v. Putnam Assocs.*, 173 F.3d 35, 39-40 (1st Cir. 1999)).

The court thus proceeded to calculate the damages to which Urnikis-Negro was entitled on the assumption that her fixed salary had already compensated her at her regular rate of pay for all of the hours she worked. Although Urnikis-Negro did not work a set schedule and her hours varied from one week to the next, because there were no contemporaneous records of the hours that Urnikis-Negro had worked, the court could not calculate a regular hourly rate on a week-to-week basis. Instead, the court calculated a regular hourly rate for each of the four periods discussed above by dividing her weekly salary of $1,000 by the average number of hours per week she worked in those periods, arriving at hourly rates of: (1) $ 15.00 per hour for the 24 weeks in the period

from July 2004 through June 2005 when she worked 66.5 hours per week; (2) $ 16.66 per hour for the 25 weeks in that same period when she worked 60 hours per week; (3) $ 20.00 per hour for the 14 weeks in the period from July 2005 through December 2005 when she worked 50 hours per week; and (4) $ 17.70 per hour for the 13 weeks in that same period when she worked 56.5 hours per week. 2008 WL 5539823, at *12. The court then calculated the overtime pay due for each of these periods by halving the regular hourly rate and multiplying it by the number of overtime hours worked during that period. That calculation yielded unpaid overtime compensation of: (1) $ 4,770 for the 24 weeks in July 2004 through June 2005 when Urnikis-Negro worked 66.5 hours per week (.50 x $ 15/hour x 26.5 hours weekly overtime x 24 weeks); (2) $ 4,165 for the 25 weeks in the same period when she worked 60 hours per week (.50 x $ 16.66/hour x 20 hours weekly overtime x 25 weeks); (3) $ 1,400 for the 14 weeks in July 2005 through December 2005 when she worked 50 hours per week (.50 x $ 20/hour x 10 hours weekly overtime x 14 weeks); and (4) $ 1,898 for the 13 weeks in the same period when she worked 56.5 hours per week (.50 x $ 17.70/hour x 16.5 hours weekly overtime x 13 weeks). *Id.* The total amount of overtime compensation due to Urnikis-Negro thus came to $ 12,233. *Id.*

The court went on to find that Urnikis-Negro was entitled to liquidated damages in an equal amount. *See* 29 U.S.C. § 216(b). As the court noted, liquidated damages are presumptively appropriate for FLSA

violations, 2008 WL 5539823, at *12 (citing *Bankston v. Illinois*, 60 F.3d 1249, 1254 (7th Cir. 1995)), and the court saw nothing in the evidence overcoming that presumption. "There is no indication that the defendants acted reasonably or in good faith in failing to pay overtime wages; rather, the defendants recklessly disregarded their obligations under this statute, just as they sought to flout their obligations under the income tax withholding and Social Security laws." *Id.* The court therefore awarded Urnikis-Negro total damages of $ 24,466 on Count One of her complaint, which set forth her FLSA claim. *Id.* The court entered an identical, cumulative amount on Count Two of her complaint, which set forth her state-law claim for overtime.[3] It also found that Urnikis-Negro was entitled to her attorney's fees and costs, *see* 29 U.S.C. § 216(b), which it later determined to be $ 95,130.71. R. 128; *Urnikis-Negro v. Am. Family Prop. Servs., Inc.*, No. 06 C 6014, 2009 WL 212122 (N.D. Ill. Jan. 26, 2009).

The district court's decision to apply the FWW method substantially reduced the damages awarded to Urnikis-Negro in two ways. First, by dividing her weekly salary by the total number of hours she

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[3] The overtime provision of the Illinois Minimum Wage Law, 820 ILCS 105/4a(1), is parallel to that of the FLSA, and Illinois courts apply the same principles, including the FWW formula, to the state provision. *See Condo v. Sysco Corp.*, 1 F.3d 599, 601 n.3 (7th Cir. 1993); *Haynes v. Tru-Green Corp.*, 154 Ill. App. 3d 967, 507 N.E.2d 945, 951, 107 Ill. Dec. 792 (Ill. App. Ct. 1987).

worked in a week rather than by 40, the FWW method reduced the hourly wage constituting her regular rate of pay. Second, by presuming that the fixed weekly wage paid to Urnikis-Negro was meant to constitute payment at the regular rate for all of the hours she worked, including overtime, it reduced the overtime pay she was owed from 150 percent of the regular rate to just 50 percent of her regular rate. Had her weekly salary been deemed to cover a standard 40-hour workweek instead of any and all hours worked in a given week, her regular rate of pay, as mentioned, would have been $ 25 per hour and she would have received one and one-half times that rate, or $ 37.50 per hour, for all hours over 40 per week. Urnikis-Negro's total pay for the 1,490.5 overtime hours she worked would have been $ 55,893.75, and an award of an equal sum as liquidated damages would have brought her total damages to $ 111,787.50 – more than four times what she actually received. Put another way, use of the FWW method reduced her total recovery by more than 75 percent.

II.

Section 7(a)(1) of the FLSA sets the maximum regular workweek at 40 hours and entitles a non-exempt employee to overtime pay for any hours beyond that number: "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half

times the *regular rate* at which he is employed." 29 U.S.C. § 207(a)(1) (emphasis supplied). The employee's "regular rate" of pay is thus the "keystone" of section 7(a). *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424, 65 S. Ct. 1242, 1244, 89 L. Ed. 1705 (1945). "On that depends the amount of overtime payments which are necessary to effectuate the statutory purposes. The proper determination of that rate is therefore of prime importance." *Id.* at 424, 65 S. Ct. at 1244-45.

For purposes of the overtime calculation, an employee's regular rate of pay is the amount of compensation he receives per hour. 29 C.F.R. § 778.109; *see Overnight Motor Transp. Co. v. Missel*, *supra*, 316 U.S. at 579-80, 62 S. Ct. at 1221. This does not mean that employers are compelled to pay their employees by the hour; "[i]t was not the purpose of Congress in enacting the Fair Labor Standards Act to impose upon the almost infinite variety of employment situations a single, rigid form of wage agreement." *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 203-04, 67 S. Ct. 1178, 1181, 91 L. Ed. 1432 (1947) (citing *Walling v. A.H. Belo Corp.*, 316 U.S. 624, 62 S. Ct. 1223, 86 L. Ed. 1716 (1942), superseded on other grounds by statute as stated in *Condo v. Sysco Corp.*, *supra*, 1 F.3d at 603 n.5), judgment modified on other grounds, 331 U.S. 795, 67 S. Ct. 1726, 91 L. Ed. 1822 (1947). Thus, although the regular rate of pay is expressed in terms of an hourly wage, employees may, in practice, be paid in a variety of other ways: "their earnings may be determined on a piece-rate, salary,

commission or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek. . . ." § 778.109; *see Missel*, 316 U.S. at 580, 62 S. Ct. at 1221.

Urnikis-Negro was a salaried employee. The computation of her regular rate of pay thus begins with the determination of her weekly salary. *See* 29 C.F.R. § 778.113. As the Supreme Court explained in *Missel*, "It is . . . abundantly clear from the words of section 7 that the unit of time under that section within which to distinguish regular from overtime is the week[:] 'No employer shall * * * employ any of his employees * * * (1) for a workweek longer tha[n] forty-four hours * * * .'" 316 U.S. at 579, 62 S. Ct. at 1221 (citation omitted).[4] Urnikis-Negro was hired at an annual salary of $ 52,000; dividing that salary by fifty-two (the number of weeks in a year) yields a weekly salary of $ 1,000. *See* § 778.113(b). To produce the regular hourly rate of pay for purposes of the overtime calculation, the weekly salary must in turn be divided "by the number of hours which the salary is intended to compensate." § 778.113(a).

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[4] As originally enacted, section 7(a) of the FLSA set the maximum regular workweek at 44 hours for the first year following the statute's effective date, 42 hours for the following year, and 40 hours thereafter. *See* 52 Stat. 1060, 1063 (June 25, 1938).

Ascertainment of the regular hourly rate of pay would be a straightforward calculation had Urnikis-Negro been hired to work a set number of hours per week. To take the easiest example, had she routinely worked from 9:00 a.m. to 5:00 p.m. five days a week, determining her regular rate of pay would be a simple matter of dividing her weekly salary of $ 1,000 by the 40 hours that salary was meant to compensate, yielding an hourly salary of $ 25.00. *See* § 778.113(a). Any hours she worked in excess of 40 would then be compensated at one and one-half times that hourly rate, or $ 37.50. *See id.*

But Urnikis-Negro was not hired to work a fixed number of hours per week. Although the district court found it likely that Urnikis-Negro when hired *believed* she would be working a 40-hour week, as she had for the bank, in fact she routinely worked many hours in excess of 40 per week throughout the period of her employment with AFPS; and the court found further that her salary was intended to compensate her for whatever hours she happened to work. Thus, although her weekly pay was fixed, her weekly hours were indeterminate and routinely exceeded the standard workweek of 40 hours. In view of the Supreme Court's decision in *Missel*, this arrangement has an impact on both the calculation of her regular rate of pay and the amount of overtime pay to which she is entitled.

The Court in *Missel* held that when an employee is, by agreement, paid a fixed weekly wage for hours that fluctuate from week to week, the proper way to

calculate the employee's regular rate of pay is to divide the weekly wage by the number of hours actually worked in a particular week.

> No problem is presented in assimilating the computation of overtime for employees under contract for a fixed weekly wage for regular contract hours which are the actual hours worked, to similar computations for employees on hourly rates. Where the employment contract is for a weekly wage with variable or fluctuating hours the same method of computation produces the regular rate for each week. As that rate is on an hourly basis, it is regular in the statutory sense inasmuch as the rate per hour does not vary for the entire week, though week by week the regular rate varies with the number of hours worked. It is true that the longer the hours the less the rate and the pay per hour. This is not an argument, however, against this method of determining the regular of employment for the week in question. Apart from the Act if there is a fixed weekly wage regardless of the length of the workweek, the longer the hours the less are the earnings per hour. This method of computation has been approved by each circuit court of appeals which has considered such problems. *See Warren-Bradshaw Drilling Co. v. Hall*, 5 Cir., 124 F.2d 42, 44; *Bumpus v. Continental Baking Co.*, 6 Cir., 124 F.2d 549, 552, cf. *Carleton Screw Products Co. v. Fleming*, 8 Cir., 126 F.2d 537, 541. It is this quotient which is the "regular rate at which an employee is

> employed" under contracts of the types described and applied in this paragraph for fixed weekly compensation for hours, certain or variable.

316 U.S. at 580, 62 S. Ct. at 1221 (footnotes omitted).

As they have some bearing on this case, a few additional details about *Missel* are worth summarizing. Missel worked as a rate clerk for a trucking company. In lieu of an hourly wage, Missel was paid a fixed weekly sum for hours that fluctuated widely from day to day but averaged (during the period for which records were available) 65 hours per week and in some weeks totaled as many as 75 or 80 hours. Despite the long hours, his employer never paid him anything additional for his overtime, on the theory that Missel's weekly compensation was sufficient to pay him the statutory minimum wage (which was 25 cents an hour during the first effective year of the FLSA, *see* 52 Stat. 1060, 1062 (June 25, 1938)) plus one and one-half times that rate for all of the overtime hours he actually worked. Effectively, the employer was asserting that Missel's regular rate of pay, by default, was the statutory minimum wage. The district court adopted that same theory in rejecting Missel's suit for overtime pay. 40 F. Supp. 174, 180 (D. Md. 1941). But the Supreme Court rejected that rationale, pointing out that there was nothing in the (unwritten) agreement between Missel and his employer limiting the number of hours he could be made to work and no provision to pay him more in the event he worked so many hours that the weekly wage

proved insufficient to compensate him even at the statutory minimum wage (plus one and one-half times that wage for overtime). 316 U.S. at 581, 62 S. Ct. at 1222. The Court was thus unwilling to presume that Missel's regular rate of pay was equal to the statutory minimum wage simply because, in hindsight, using that rate meant that Missel had already received both the regular and overtime pay to which he was entitled. "Implication cannot mend a contract so deficient in complying with the law." *Ibid.* Instead, in the absence of any contractual provision for overtime, the court presumed that Missel's fixed weekly wage was meant to compensate him only at the regular rate for the hours that he worked, exclusive of any overtime premium. *Id.* at 580, 62 S. Ct. at 1221. Taking this approach meant that Missel's regular rate of pay would be higher than the minimum wage and that his employer would owe him additional pay (and at a higher rate) for the many overtime hours he had worked. That result was consistent with what the Court cited as one of the purposes of the FLSA, which was to exert pressure on employers to shorten the workweek and spread work among a greater number of employees by requiring employers to pay a premium for overtime work. *Id.* at 577-78, 62 S. Ct. at 1220.

Notably, the approach taken by the Court in *Missel* treats the fixed weekly wage paid to the employee as compensation at the regular rate for *all* hours that the employee works in a week, including overtime hours. The employer will separately owe the

employee a premium for the overtime hours, but because he has already been compensated at the regular rate for the overtime hours by means of the fixed wage, the employer will owe him only one-half of the regular rate for those hours rather than time *plus* one-half. As *Missel* itself also recognizes, the employee's regular rate of pay will vary depending on the number of hours he works in a given week; the greater the number of hours he works, the lesser will be his regular, hourly rate of pay. And the overtime premium that the employer owes his employee for any hours worked above 40 will rise or fall along with the total number of hours worked in a week and the resulting regular rate of pay.

Missel's method of determining the regular rate of pay for an employee whose work hours fluctuate but who is paid a fixed salary for whatever hours he works has since been incorporated into an interpretive rule promulgated by the Department of Labor. *See* 29 C.F.R. § 778.114. It is among a number of rules comprising a broader interpretive bulletin issued in 1968 that memorializes the Department of Labor's understanding of the meaning and application of the maximum hours and overtime pay requirements of the FLSA. 33 Fed. Reg. 986 (Jan. 23, 1968); *see* 29 C.F.R. § 778.1 The bulletin was not issued pursuant to the usual notice and rulemaking procedures used with formal regulations. 33 Fed. Reg. 986; *see Mayhew v. Wells*, 125 F.3d 216, 218 (4th Cir. 1997); *Desmond v. PNGI Charles Town Gaming, LLC*, 661 F. Supp. 2d 573, 579 n.2 (N.D. W. Va. 2009);

In re Texas EZPawn Fair Labor Standards Act Litigation, 633 F. Supp. 2d 395, 399, 402 (W.D. Tex. 2008). However, as the bulletin reflects the DOL's official understanding of the FLSA's requirements, it is nonetheless entitled to a "measure of respect" from the judiciary. *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 390, 128 S. Ct. 1147, 1156, 170 L. Ed. 2d 10 (2008) (quoting *Alaska Dep't of Environmental Conservation v. EPA*, 540 U.S. 461, 488, 124 S. Ct. 983, 1001, 157 L. Ed. 2d 967 (2004)); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140, 65 S. Ct. 161, 164, 89 L. Ed. 124 (1944); *Missel*, 316 U.S. at 580 n.17, 62 S. Ct. at 1221-22 n.17; *see U.S. Freightways Corp. v. C.I.R.*, 270 F.3d 1137, 1141 (7th Cir. 2001) (courts give full deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), only to those regulations issued with full notice and opportunity for comment or like formalities; more informal statements of position "receive a more flexible respect"). We have specifically sustained section 778.114 as a reasonable construction of the FLSA's overtime requirements. *Condo*, 1 F.3d at 605. And as our discussion will make clear, our reservation is not with the Department of Labor's interpretive rule, but rather with judicial application of that rule to misclassification cases in which the rule's prerequisites are not met.

Section 778.114 explains how and under what circumstances an employer may compensate an employee using the FWW method:

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid [to] him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the [FLSA] if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay

requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $ 250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $ 6.25, $ 5.68, $ 5, and $ 5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $ 250; for the second week $ 261.36 ($ 250 plus 4 hours at $ 2.84, or 40 hours at $ 5.68 plus 4 hours at $ 8.52); for the third week $ 275 ($ 250 plus 10 hours at $ 2.50, or 40 hours at $ 5 plus 10 hours at $ 7.50); for the fourth week approximately $ 270.88 ($ 250 plus 8 hours at $ 2.61 or 40 hours at $ 5.21 plus 8 hours at $ 7.82).

(c) The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the

> employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

§ 778.114.[5]

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[5] Although section 778.114 in its current form dates to 1968, the Department of Labor's Wage & Hour Division has, since the earliest days of the FLSA, taken the position that

(Continued on following page)

Several aspects of this interpretive rule bear mentioning. First, the rule is forward looking. It describes a manner in which an employer may compensate a non-exempt employee by means of a fixed wage for variable work hours and still comply with the overtime obligation imposed by the FLSA. Second, the rule requires both a "clear mutual understanding" between the employer and employee that the fixed wage will constitute the employee's regular or straight-time pay for any and all hours worked in a given week *and* the separate payment of an overtime premium for any hours in excess of 40 that are worked in that week. § 778.114(a). Third, the rule on its face is not a remedial measure. It says nothing about how a court is to calculate damages where, as here, the employer has breached its obligation to pay the employee an overtime premium. Its focus instead

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when an employer and its employee have agreed that the employee will be paid a fixed salary for work hours that fluctuate from week to week, his regular rate of pay should be determined by dividing the fixed wage by the hours worked in a particular week, and the employee will be owed a premium of 50 percent of that rate for any overtime hours. *See* Interpretative Bulletin No. 4 PP 10, 12 (Oct. 21, 1938, as revised November 1940), 1941 Wage & Hour Man. (BNA) 127, 128-29. The Supreme Court noted as much in *Missel*, 316 U.S. at 580 n.17, 62 S. Ct. at 1221-22 n.17, adding that "[w]hile the interpretative bulletins are not issued as regulations under statutory authority, they do carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application." *See also Walling v. A.H. Belo Corp.*, *supra*, 316 U.S. at 631 n.7, 62 S. Ct. at 1227 n.7.

is on how an employer may comply with its statutory obligations in the first instance and avoid liability for breach of those obligations.

Despite the nonremedial nature of the rule, a number of courts – both appellate and district – have relied on section 778.114(a) in fashioning relief for cases in which an employee receiving a fixed wage has been misclassified as exempt from the overtime mandate of the FLSA and thus has not received overtime pay. *See Clements v. Serco, Inc.*, 530 F.3d 1224, 1230-31 (10th Cir. 2008); *Valerio v. Putnam Assocs.*, *supra*, 173 F.3d at 39-40; *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1138-39 (5th Cir. 1988); *see also, e.g.*, *Desmond v. PNGI Charles Town Gaming, LLC*, *supra*, 661 F. Supp. 2d at 578-85; *Torres v. Bacardi Global Brands Promotions, Inc.*, 482 F. Supp. 2d 1379, 1380-82 (S.D. Fla. 2007); *Perez v. RadioShack Corp.*, No. 02 C 7884, 11 Wage & Hour Cas. 2d (BNA) 163, 2005 WL 3750320, at *6-*8 (N.D. Ill. Dec. 14, 2005); *Tumulty v. FedEx Ground Package Sys., Inc.*, No. C04-1425P, 2005 U.S. Dist. LEXIS 25997, 2005 WL 1979104, at *4-*5 (W.D. Wash. Aug. 16, 2005); *Saizan v Delta Concrete Prods. Co.*, 209 F. Supp. 2d 639, 640-41 (M.D. La. 2002); *Donihoo v. Dallas Airmotive, Inc.*, No. Civ. A. 3:97-CV-0109P, 1998 WL 47632, at *6 (N.D. Tex. Feb. 2, 1998). As the district court did here, these courts typically have relied on proof of a clear mutual understanding between the employer and the employee that the employee's fixed salary was meant to compensate him for any and all hours that the employee worked to

place the case within the FWW framework. Although the employee, as a result of the misclassification, has never been paid an overtime premium, courts fill in that piece of the FWW formula by making the premium part of the damages award. The employee's regular rate of pay is determined by the total hours worked in a week into his fixed weekly wage, and he is awarded a premium of one-half of that rate for the overtime hours he worked in that week. *See, e.g.*, *Clements*, 530 F.3d at 1230-31; *Valerio*, 173 F.3d at 39-40; *Blackmon*, 835 F.2d at 1138-39.

The fit between section 778.114(a) and the misclassified employee is an imperfect one, to be sure, for reasons we have already touched upon. Besides looking forward rather than backward, the interpretive rule plainly envisions the employee's contemporaneous receipt of a premium apart from his fixed wage for any overtime work he has performed. The rule expressly requires both "a clear mutual understanding [between] the parties that the fixed salary is compensation (*apart from overtime premiums*) for the hours worked each workweek, whatever their number" and that the employee "*receive[] extra compensation, in addition to such salary for all overtime hours worked at a rate not less than one-half his regular rate of pay.*" § 778.114(a) (emphasis ours). *See Condo*, 1 F.3d at 601; *see also* 29 C.F.R. § 778.106 ("The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends."); *see also Rainey v. Am. Forest & Paper Ass'n*,

26 F. Supp. 2d 82, 100-01 (D.D.C. 1998) (coll. cases in which judicial use of FWW method deemed appropriate because overtime premium was paid contemporaneously to employee), disagreed with on other grounds by *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001).[6] Plainly the employee has not received such extra compensation when, as was true in this case, her employer has misclassified her as exempt from the FLSA's overtime requirements and has never separately paid her for overtime. *See Monahan v. Emerald Performance Mat'ls, LLC*, 705 F. Supp. 2d 1206, 2010 WL 724031, at *9 (W.D. Wash. Feb. 25, 2010) (resolving state law claim with reference to federal law); *Russell v. Wells Fargo & Co.*, 672 F. Supp. 2d 1008, 1013-14 (N.D. Cal. 2009); *Brown v. Nipper Auto Parts & Supplies, Inc.*, No. Civ. A. 7:08CV00521, 156 Lab. Cas. P 35,579, 2009 WL 1437836, at *7 (W.D. Va. May 21, 2009); *Texas EZPawn*, *supra*, 633 F. Supp. 2d at 401; *Scott v. OTS Inc.*, No. Civ. A. 1:02CV1950-AJB, 11 Wage & Hour Cas. 2d (BNA) 1714, 2006 WL 870369, at *13 (N.D. Ga. Mar. 31, 2006); *Cowan v. Treetop Enters., Inc.*, 163 F. Supp. 2d 930, 941 (M.D. Tenn. 2001);

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[6] In 2008, the Department of Labor's Wage & Hour Division issued a notice of proposed rulemaking which, in relevant part, proposed to modify section 778.114(a) by deleting the phrase "apart from overtime premiums" from the language describing the clear mutual understanding between the employer and employee that the latter's salary will serve as compensation for whatever hours he works in a given week. 73 Fed. Reg. 43654, at 43669-70 (Jul. 28, 2008). The proposed modification was not adopted, however.

Rainey, 26 F. Supp. 2d at 100-01; *see also Hunter v. Sprint Corp.*, 453 F. Supp. 2d 44, 59-60 (D.D.C. 2006); *Rushing v. Shelby County Gov't*, 8 F. Supp. 2d 737, 745 (W.D. Tenn. 1997). Subsection (c) of the rule reinforces this point, cautioning that "where all the facts indicate an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula." Section 778.114(a) is thus a dubious source of authority for calculating a misclassified employee's damages in the way that the district court did here. A number of district courts, noting that the rule's requirements invariably have not been satisfied in employee-misclassification cases, have thus rejected reliance on the rule in calculating an employee's regular rate of pay. *See Monahan*, 2010 WL 724031, at *7-*9; *Brown*, 2009 WL 1437836, at *6-*7; *Russell*, 672 F. Supp. 2d 1008; *Texas EZPawn*, 633 F. Supp. 2d at 400-06; *Scott*, 2006 WL 870369, at *11-*13; *Cowan*, 163 F. Supp. 2d at 940-42; *Rainey*, 26 F. Supp. 2d at 100-02. We find the reasoning of these cases to be persuasive.

But finding that section 778.114(a) itself is inapplicable does not compel the conclusion that reliance on the FWW method of calculating Urnikis-Negro's regular rate of pay was erroneous. Setting the Department of Labor's rule aside, a court still must ascertain the employee's regular rate of pay and calculate an appropriate overtime premium based on that rate. Where the employee was paid a fixed

weekly salary, this requires first determining the number of hours that salary was intended to compensate. A number of courts that have deemed section 778.114 inapplicable have reasoned that if the requirements of the rule are not met, one should presume that an employee's fixed weekly salary was meant to compensate him solely for 40 hours of work even when he regularly worked more than 40 hours without any expectation of additional pay. *E.g.*, *Monahan*, 2010 WL 724031, at *8; *Texas EZPawn*, 633 F. Supp. 2d at 397, 404-05; *Rainey*, 26 F. Supp. 2d at 85, 102. Employing that presumption would lead to the conclusion that the employee has received no pay at all for his overtime (i.e., neither straight-time pay nor an overtime premium) and is thus entitled to one and one-half his regular rate of pay for all overtime hours. It would also boost his regular rate of pay, as his fixed weekly wage would be divided by 40 rather than the (higher) total number of hours he worked during the week. *Texas EZPawn*, 633 F. Supp. 2d at 404.

Assuming without deciding that it might be appropriate to presume that a misclassified employee's fixed salary was meant to compensate him solely for 40 hours, the presumption cannot be irrebuttable. The employee's regular rate of pay is a factual matter, *Walling v. Youngerman-Reynolds Hardwood Co.*, *supra*, 325 U.S. at 424-25, 65 S. Ct. at 1245, and where the employer and the employee have in fact agreed that a fixed weekly salary will constitute payment at the regular rate for any and all hours worked

– which *Missel* recognizes they are free to do, *see* 316 U.S. at 580, 62 S. Ct. at 1221[7] – there is no factual basis for deeming the salary to constitute straight-time compensation for 40 hours alone. True, the employer in this scenario, and perhaps the employee as well, have failed to recognize the employee's entitlement to a premium for overtime hours. In that respect, the agreement runs afoul of the FLSA. But that breach of the statute does not alter the employee's regular rate of pay, which under *Missel* turns on what the parties agreed the employee would be paid for the hours he actually worked (so long as the rate is not lower than the minimum wage). The overtime premium can and will be awarded by the court retroactively. *See* Paul Decamp & Jacqueline C. Tully, *Half-Time or Time and A-Half? Calculating Overtime in Misclassification Cases*, 278 Fair Lab. Stds. Handbook for States, Local Gov't & Sch. Newsl. 3 (Nov. 2008) (proper focus in calculating regular rate of pay for misclassified employee is on whether parties intended fixed salary to compensate employee for all hours worked in workweek or solely for first 40 hours).

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[7] *See also Walling*, 325 U.S. at 424, 65 S. Ct. at 1245 ("As long as the minimum hourly rates established by Section 6 are respected, the employer and employee are free to establish th[e] regular rate at any point and in any manner they see fit. They may agree to pay compensation according to any time or work measurement they desire.").

The evidence in this case was mixed as to the number of hours Urnikis-Negro's fixed weekly salary was meant to compensate. Urnikis-Negro testified that she expected, at the time of her hiring, to be working 40 hours per week and that Lash had offered her the job at $ 1,000 per week for hours similar to those she had been working at the bank, which amounted to 40 per week. R. 97 at 35, 53, 64. Lash himself testified that all AFPS employees were paid based on a 40-hour week. R. 98 at 80 (quoting R. 42-5 at 30). Yet, it is undisputed that Urnikis-Negro routinely worked substantially more than 40 hours per week throughout her tenure with AFPS and was never paid anything apart from her fixed weekly wage of $ 1,000. In weighing the evidence, the district court found that although Urnikis-Negro likely thought she would be working 40-hour weeks, "her understanding was that her salary was to cover whatever time she was called upon to work in a given week." 2008 WL 5539823, at *2. The court found further that it was "less than crystal clear what [Lash] meant" when he said that all salaries at AFPS were based on a 40-hour week; in the court's view, it was a fair inference that Lash was simply acknowledging the company's obligation to pay overtime to any employees who worked more than 40 hours and were not exempt from the statute's overtime requirement. *Id.* Ultimately, the court determined that Urnikis-Negro and the defendants had a "clear mutual understanding" that her weekly salary of $ 1,000 was meant to compensate her for however many hours she worked, not 40 or some other number. [WL]

at *12. This was a finding of fact and it was not clearly erroneous. It is true that the court made this finding in the context of applying section 778.114(a), which as we have discussed is not a remedial rule and thus does not supply the proper analytical framework for a determination of damages once an employer has been found to have breached its obligation to pay overtime under the FLSA. Nonetheless, the court's finding addresses the very question that is the starting point for determining Urnikis-Negro's regular rate of pay: For what number of hours was her fixed weekly wage intended to compensate her? The court here unequivocally determined that Urnikis-Negro's wage was intended to compensate her not for 40 hours per week or some other fixed number of hours, but for any and *all* hours that she worked in a given week.[8]

Given this finding, it is *Missel* which dictates how the regular rate of pay must be calculated here. *See Martin v. Tango's Rest., Inc.*, 969 F.2d 1319, 1324 (1st Cir. 1992) ("[*Missel's*] outcome is binding on us

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[8] We note that the agreement that an employee is to be paid a fixed salary for whatever hours she worked need not be evidenced in writing. *Griffin v. Wake County*, 142 F.3d 712, 716 (4th Cir. 1998) (citing *Bailey v. County of Georgetown*, 94 F.3d 152, 156 (4th Cir. 1996)). The existence of such an agreement instead may be inferred from the parties' conduct. *See Mayhew v. Wells*, *supra*, 125 F.3d at 219 (citing *Monahan v. County of Chesterfield, Va.*, 95 F.3d 1263, 1281 n.21 (4th Cir. 1996)); *see also, e.g., Clements v. Serco, Inc.*, *supra*, 530 F.3d at 1231; *Valerio v. Putnam Assocs.*, *supra*, 173 F.3d at 39-40.

and the district judge. . . ."); *Rushing v. Shelby County Gov't*, *supra*, 8 F. Supp. 2d at 745 ("[t]his is not a proper case for application of the fluctuating workweek provision [section 778.114,]" as the parties' agreement did not include understanding that plaintiffs were entitled to overtime pay; calculation of overtime premium was instead governed by *Missel*); *Zoltek v. Safelite Glass Corp.*, 884 F. Supp. 283, 287 (N.D. Ill. 1995) ("Because the parties agreed that Zoltek was to be compensated on a salaried basis, with no additional payment for overtime hours, the calculation of his 'regular rate' is governed by the formula described in [*Missel*].."). Urnikis-Negro, like *Missel*, was paid a fixed weekly sum for any and all hours that she worked. Like Missel, she routinely worked substantial amounts of overtime. And like *Missel*, she never received any premium for the overtime hours she worked. The Supreme Court held that in this situation, the employee's regular rate of pay for a given week is calculated by dividing the fixed weekly wage by the total number of hours worked in that week. 316 U.S. at 580, 62 S. Ct. at 1221. The employee is then entitled to an overtime premium of one-half of that rate. *See ibid.* & n.16; *Walling*, 316 U.S. at 634, 62 S. Ct. at 1228 (discussing calculation of regular and overtime rates of pay under *Missel*). As we have noted, this method of calculating an employee's regular rate of pay and the overtime premium has been incorporated into section 778.114, which is why the result of applying that rule is correct even if, analytically, the rule itself is inapt. Indeed, the approach pre-dates the Supreme Court's

decision in *Missel*, which noted that it already had been adopted by every circuit court of appeals to address the subject. 316 U.S. at 580, 62 S. Ct. at 1221 (coll. cases); *see Warren-Bradshaw Drilling Co. v. Hall*, 124 F.2d 42, 44 (5th Cir. 1941) (cited in *Missel*) ("What the statute in effect provides, and what this court has held, is: That overtime must be compensated for at one and one-half times the regular rate at which the wage earner is employed; that that rate may be fixed by agreement; and that if there is no agreement fixing the amount to be paid for regular and overtime work, the regular rate, as to it, may properly be determined by dividing the total pay each week by the total hours worked."), judgment aff'd, 317 U.S. 88, 63 S. Ct. 125, 87 L. Ed. 83 (1942); *Bumpus v. Continental Baking Co.*, 124 F.2d 549, 553 (6th Cir. 1941) (cited in *Missel*) (calculating employee's regular rate by dividing fixed weekly wage by the 48 hours per week it was intended to compensate, and further holding that "[f]or each overtime hour for which appellant received his regular rate he is entitled only to additional half-time pay"), cert. denied, 316 U.S. 704, 62 S. Ct. 1305, 86 L. Ed. 1772 (1942); *see also Missel v. Overnight Motor Transp. Co.*, 126 F.2d 98, 110 (4th Cir. 1942) (coll. district court and state cases applying same approach), judgment aff'd, 316 U.S. 572, 62 S. Ct. 1216, 86 L. Ed. 1682.

Indeed, it is worth noting that in *Missel*, the Fourth Circuit explicitly rejected the use of the statutory maximum workweek as the basis for calculating the employer's regular rate of pay. The plaintiff had

suggested using the statutory maximum (then 42 or 44 hours per week) as a divisor instead of the total hours worked in a week. 126 F.2d at 101. But the court found "[n]o authority" for that method of calculating his regular rate of compensation and rejected it on that basis. *Id.* at 102 n.3. And the Supreme Court, as we have discussed, held that it was appropriate to divide the plaintiff's fixed weekly wage by the total hours worked rather than by some other number. *See Martin*, 969 F.2d at 1324; *Rushing*, 8 F. Supp. 2d at 745; *Zoltek*, 884 F. Supp. at 287-88.[9]

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[9] As we have noted, the Wage & Hour Division of the Department of Labor itself took the same approach to determining an employee's regular rate of pay prior to the Supreme Court's decision in *Missel*. *See* n.5, *supra*. In recent years, the Division has also issued two opinion letters supporting the retroactive payment of overtime pursuant to the FWW formula. A 1996 letter answered "yes" to the question whether the Division's coefficient table for calculating overtime premiums of 50 percent could be used to retroactively determine the amount of overtime due to an employee who was never paid overtime in the first instance. Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter – FLSA, 1996 WL 1005216 (July 15, 1996). But because the letter reveals little about the circumstances underlying the inquiry and the Division's reasons for answering in the affirmative, it carries little if any persuasive weight. *See Hunter*, 453 F. Supp. 2d at 59-60 n.18. More recently, in a much more detailed letter, the Division agreed that an employer could properly use the FWW method to retroactively calculate the overtime owed to a salaried employee who regularly worked in excess of 40 hours per week, but whom the employer only belatedly realized was not exempt from the overtime mandate of the FLSA. *See* Wage & Hour Div., U.S. Dep't of Labor, *Retroactive payment of overtime and the fluctuating workweek method of payment*, Opinion Letter FLSA 2009-3 (Jan. 14, 2009). Citing

(Continued on following page)

As Urnikis-Negro points out, there are ways in which calculating her regular rate of pay in this manner works to the defendants' benefit. As we noted in summarizing the district court's holding, dividing Urnikis-Negro's weekly salary by the total hours she worked in a week, rather than by 40, results in a significantly lower hourly rate, as Urnikis-Negro routinely worked substantially more than 40 hours per week. And by treating her overtime hours as already having been compensated at the regular rate of pay, such that she is owed only the 50-percent overtime premium, this method substantially reduces the amount of overtime pay to which she is now entitled. Consider the following table reflecting the calculation of the regular rate of pay and the corresponding overtime premium using the FWW method for an employee who, like Urnikis-Negro, is paid a fixed salary of $ 1,000 per week:

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the Tenth Circuit's decision in *Clements* and the First Circuit's decision in *Valerio*, the letter found it sufficient that the parties had a clear mutual understanding that the fixed salary was meant to compensate the employee for whatever number of hours he worked in a week. The detail of this second letter imbues it with somewhat more persuasive force than the first, but it adds nothing beyond the points that the courts analyzing this issue have already made.

Calculation of Overtime Using FWW Method

Weekly Hours	Regular Rate[10]	O/T Premium	O/T Hours	Total Pay
40 hours	$ 25.00/ hour	$ 12.50/ hour	0	$ 1,000
50 hours	$ 20.00/ hour	$ 10.00/ hour	10	$ 1,100
60 hours	$ 16.67/ hour	$ 8.33/ hour	20	$ 1,166
80 hours	$ 12.50/ hour	$ 6.25/ hour	40	$ 1,250
100 hours	$ 10.00/ hour	$ 5.00/ hour	60	$ 1,300

What the table makes clear is that the employee's hourly rate of pay is inversely proportional to how hard she works. For a workweek equaling the statutory maximum of 40 hours, the employer is compensated at the rate of $ 25.00 per hour. For a workweek twice that long, her regular hourly rate is one-half that much – $ 12.50 per hour – and her overtime premium is likewise one-half of what it would be based on a 40-hour workweek. In effect, comparing the two rates of pay, the employee who works an 80-hour week is not receiving time and

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[10] We note that the each of the regular rates of pay set forth in this table is above the federal minimum wage, which currently is $ 7.25 per hour.

a-half for her overtime hours, but half-time ($ 18.75 total compensation per overtime hour versus $ 37.50).

At the same time, because the employer is made to pay the misclassified employee an overtime premium no greater than it would have paid had it complied with section 778.114(a) in the first instance, the employer receives the benefit of the rule without having ever paid the employee contemporaneously for her overtime work. By contrast, calculating the worker's regular rate of pay on the basis of a 40-hour week rather than the FWW method would boost the worker's damages and penalize the employer more severely for having misclassified her. Urnikis-Negro argues that use of the more employer-friendly FWW method gives employers an incentive to misclassify employees as exempt from the FLSA's overtime requirements or otherwise withhold overtime pay, as they will be little the worse off if and when sued to enforce the statute's requirements.

We would add that cases like this one, where the employee has routinely worked more than a 40-hour week, do not truly fit the fluctuating workweek paradigm, in that the employee's hours rarely if ever drop below 40. *See* § 778.114(c) ("Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks *as well as short ones*, under the circumstances of the employment as a whole.") (emphasis ours); *Heder v. City of Two Rivers, Wis.*, 295 F.3d 777, 779-80 (7th Cir. 2002). Use of the

FWW method in these cases makes it look more like a way to simply reduce the employee's compensation rather than to compensate for fluctuations above *and* below the standard 40-hour week. And rather than giving employers an incentive to reduce employees' working hours and to spread available work among greater numbers of employees, as the statutory overtime pay requirement was meant to do, *see Walling v. Youngerman-Reynolds Hardwood Co.*, *supra*, 325 U.S. at 423-24, 65 S. Ct. at 1244; *Missel*, 316 U.S. at 577-78, 62 S. Ct. at 1220, the FWW method would seem to give them exactly the opposite incentive, for as the workweek lengthens, the employer is paying her less per hour in straight-time pay and owes her a correspondingly smaller overtime premium for each hour of work over 40. In short, the hourly cost of labor using the FWW method decreases the longer the employee is required to work.

There are answers to these criticisms. First, the Supreme Court in *Missel* was well aware of the ways in which the FWW method of calculating straight-time pay and overtime pay reduced the amounts owed to the employee for hours worked in excess of the standard workweek. It adopted that method nonetheless. 316 U.S. at 580, 62 S. Ct. at 1221. Second, even if the 50-percent overtime premium that Urnikis-Negro achieves by way of a lawsuit is no more than the defendants would (and should) have paid her in the first instance in complying with section 778.114(a), that is not the sole relief to which she is entitled. The district court awarded her liquidated

damages equal in amount to the award of the overtime premium based on the finding that the defendants' violation of the FLSA was wilful, and it also awarded Urnikis-Negro her attorney's fees and costs. So the defendants are in some real sense suffering the consequences of not complying with their legal obligations in the first instance. Finally, the pattern of working excess hours appears also to have been present in *Missel*, where the plaintiff worked an average workweek of 65 hours (more than 20 hours over the applicable maximum), 316 U.S. at 574, 62 S. Ct. at 1218, and yet the Court had no hesitation in embracing the FWW method of calculating his regular hourly rate of pay. It was enough, in the Court's view, that Missel's hours varied, despite the evident possibility that they fluctuated only *above* the statutory maximum rather than below it. More to the point, we found it proper to apply section 778.114 in *Condo v. Sysco Corp.* despite our acknowledgment that the plaintiff never worked less than 40 hours per week. 1 F.3d at 602-03. *See also* § 778.114(b) (setting forth example in which employee's hours in each of four workweeks meet or exceed 40).

It is not within our province to pass on the merits of these competing arguments. Our job is to apply the statute as Congress has written it and as the Supreme Court and the Department of Labor have interpreted it. Any argument to the effect that the fluctuating workweek method of calculating one's regular rate of pay and overtime premium is insufficiently compensatory to the plaintiff and insufficiently deterring to

the employer that is inclined to neglect its obligations under the FLSA is an argument better addressed to Congress and the Secretary of Labor.

III.

The district court correctly calculated Urnikis-Negro's regular rate of pay and the premium to which she was entitled for the overtime hours she worked while in the defendants' employ. We therefore AFFIRM the district court's judgment. We thank Urnikis-Negro and her counsel for the excellent briefing on the issue presented.

URNIKIS-NEGRO, Plaintiff, vs. AMERICAN FAMILY PROPERTY SERVICES, INC., NICOLE LASH, and TODD LASH, Defendants.

Case No. 06 C 6014

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2008 U.S. Dist. LEXIS 102034

July 21, 2008, Decided
July 21, 2008, Filed

COUNSEL: For Brenda Urnikis-Negro, Plaintiff: Aaron Benjamin Maduff, LEAD ATTORNEY, Maduff & Maduff, LLC, Chicago, IL; Christina D. Hatzidakis, Maduff & Maduff, Chicago, IL; Jason M. Johnson, Law Office of Jason M. Johnson, Deerfield, IL; Michael Lee Maduff, Maduff, Medina & Maduff, Chicago, IL.

For American Family Property Services, Inc., Nicole Lash, Todd Lash, Defendants: Charles L. Bretz, LEAD ATTORNEY, Cosmo J Tedone, Erin Webster O'Sullivan, Chuck Bretz & Associates, P.C., Joliet, IL; Linzey D. Jones, Jr., LEAD ATTORNEY, John M. Broderick, Pugh, Jones, Johnson & Quandt, P.C., Chicago, IL.

JUDGES: MATTHEW F. KENNELLY, United States District Judge.

OPINION BY: MATTHEW F. KENNELLY

OPINION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

MATTHEW F. KENNELLY, District Judge:

Brenda Urnikis-Negro sued her former employer American Family Property Services, Inc. (AFPS) and its owners Nicole Lash and Todd Lash under the Fair Labor Standards Act, 29 U.S.C. § 216(b), and the Illinois Minimum Wage Law, 820 ILCS 105/12(a), for unpaid overtime compensation, and under the Illinois Wage Payment Collection Act, 820 ILCS 115/11, for unpaid vacation pay. The Court conducted a bench trial on Urnikis-Negro's claims on April 21-22, 2008. This constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a)(1).

The Court prefaces its decision by noting that it found a good deal of the testimony offered at trial to lack credibility, because it was delivered by plainly biased witnesses or persons whose interest in the outcome affected, in the Court's view, their recollection of certain events, or because the testimony simply was unreasonable or made no sense in light of all the evidence. In making the findings set forth below, in particular those concerning Urnikis-Negro's duties and responsibilities at AFPS, the Court has relied largely on the testimony of witnesses it considered to be lacking in bias or an interest in the outcome or whose testimony was otherwise credible, in particular Karen Boivin, Thomas Brannon, and Judy

Casey, as well as on other testimony that the Court considered to have sufficient indicia of believability and accuracy in light of all the evidence.

Facts[1]

The Court finds the facts as follows. AFPS was a real estate appraisal firm owned by Todd Lash and Nicole Lash. Real estate appraisers are licensed by the State of Illinois. There are two relevant categories of licensed appraisers: associate appraisers and certified appraisers. To become a associate appraiser, a person must complete specified training and pass a state examination. To become a certified appraiser, a person must have an associate appraiser's license for a specified period, complete additional training, and pass a separate state examination.

Todd Lash became licensed as an associate appraiser in the late 1990's and became a certified appraiser in or about 2000. He and his wife Nicole Lash started AFPS – then called Epic Appraisal – in 2003. (The Court will refer to the defendant entity only as "AFPS" for the sake of simplicity.) Lenders retained AFPS to conduct appraisals on residential properties on which they were considering making mortgage loans.

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[1] Facts concerning the issue of damages are addressed later in this decision.

Through early 2004, Todd Lash was the only certified appraiser at AFPS. He worked with a number of associate appraisers, some of whom worked on-site at AFPS's offices and some of whom were independent appraisers who worked with AFPS on a contract basis. The associate appraisers typically prepared the appraisal reports. Lash reviewed each report, approved it if appropriate, and forwarded it to the lender that had retained AFPS to conduct the appraisal.

AFPS hired Urnikis-Negro in July 2004. The volume of AFPS's business was growing, and Lash wanted assistance in reviewing appraisal reports prepared by associate appraisers so that he could spend less time at AFPS. Lash told Urnikis-Negro he would train her so that she could assist in that function. Lash also agreed to pay for appraisal classes for Urnikis-Negro so that she could eventually become an associate appraiser. Urnikis-Negro had previously worked at LaSalle State Bank as office manager of the loan department and had no experience with real estate appraisals.

Lash hired Urnikis-Negro at a salary of $ 1,000 per week. This was, at the time, the highest salary paid to anyone working for AFPS, and it represented a significant increase over what Urnikis-Negro had made in her job at LaSalle State Bank. Lash agreed to pay Urnikis-Negro at this level because he wanted to devote more time to other pursuits and could not do so unless he hired someone to assist with some of

the more time-consuming aspects of his work at AFPS.

Urnikis-Negro understood that she would be an employee of AFPS. In her initial paycheck, however, AFPS paid her as one might pay an independent contractor – in other words, without withholding income or Social Security taxes from her pay. After Urnikis-Negro complained about this, AFPS changed her method of pay and began to withhold taxes from her paycheck. It was clear from the evidence that Urnikis-Negro was, at all times, an employee of AFPS, not an independent contractor. Despite this, Lash and AFPS initially tried to treat her as an independent contractor for payroll purposes, contrary to their mutual understanding, in an effort to avoid their legal obligation to withhold and pay income and Social Security taxes on her behalf.

When Lash hired Urnikis-Negro, they did not discuss the specific number of hours she would be working, and Urnikis-Negro was not given a set schedule of what hours she would work on what days. Her job was task-oriented, and her days and hours depended on the volume of business AFPS had. Though Urnikis-Negro likely believed that she would be working forty-hour weeks, her understanding was that her salary was to cover whatever time she was called upon to work in a given week. On the other hand, Lash testified at his deposition that all employees of AFPS were paid on a basis of a forty hour work week. Though it is less than crystal clear what he meant by this, it is a fair reading that this testimony

reflected Lash's recognition that the law required paying employees, at least non-exempt employees, extra for time worked in excess of forty hours per week – whether or not he or AFPS ever intended to comply with that requirement. In any event, as things turned out, Urnikis-Negro ended up working far more than forty hours per week and far more hours than she originally expected.

During her first few weeks on the job, Urnikis-Negro worked with Lash to observe him so she could learn the process he followed to review appraisal reports. After a few weeks, Urnikis-Negro began to work without direct supervision.

Urnikis-Negro's duties included a number of largely clerical functions, including filing appraisal reports, answering the telephone, making calls to mortgage brokers and lenders (from a list supplied by Lash) to solicit new business, and making calls to collect on outstanding invoices for appraisals AFPS had done. None of these tasks involved the use of judgment or discretion on Urnikis-Negro's part, nor did defendants so contend at trial.

Urnikis-Negro also communicated with AFPS's clients, typically lenders who had requested appraisals. On some occasions, a lender would call to inquire regarding the status of an appraisal; Urnikis-Negro would contact the appraiser assigned to the property to determine the status of his or her work and then would communicate this to the lender. On other occasions, a lender would advise AFPS of errors or

deficiencies in appraisals; again, Urnikis-Negro would communicate the particular problem to the appraiser who had done the work. On some occasions, an appraiser's report would be rejected, but the rejection came from the lender, not from Urnikis-Negro, who simply communicated the lender's decision. Again, this particular job responsibility did not involve the use of judgment or direction on Urnikis-Negro's part.

Of greater significance to the present case, Urnikis-Negro's duties included reviewing appraisal reports prepared by associate appraisers and outside certified appraisers. Urnikis-Negro reviewed the reports for errors and inconsistencies and to check whether they conformed to the requirements of the particular lender for which the appraisal was being done. The Court finds, based on the credible evidence in the case, that Urnikis-Negro's work in this regard largely consisted of that of a glorified proofreader. Her responsibility in reviewing the appraisal reports was to make sure that all the necessary parts of the report form were filled in, the form did not contain facially apparent errors, and it did not have internal inconsistencies. In addition, as indicated above, on some occasions Urnikis-Negro was responsible for communicating to the appraiser deficiencies that had been noted by the mortgage lender. These duties, which took up the majority of the time Urnikis-Negro spent on the job, did not involve the exercise of discretion or judgment on her part. Rather, Urnikis-Negro simply ensured that forms had been filled out

correctly, completely, and without errors. Any discretion or judgment exercised in connection with the appraisal forms was exercised by the appraiser, who had ultimate responsibility (both practically and legally) for everything in the appraisal report.

To be sure, Urnikis-Negro's duties in reviewing appraisal reports did involve, to a relatively minor degree, something more than simply making sure that reports had been filled out completely and did not include patent mistakes. Specifically, Urnikis-Negro was responsible for identifying problems that might crop up upon a lender's review of the report. To some extent, it is more accurate to refer to this particular responsibility as that of an issue-spotter rather than that of a glorified proofreader. But Urnikis-Negro's function was simply to identify such issues, not to resolve them. When she spotted a potential problem, her role ended when she communicated it to the appraiser who had prepared the report. As indicated earlier, the appraiser(s) signing the report had the sole responsibility to determine what was and was not included in the report. Any discretion or judgment applied in connection with the issuance of an appraisal report was, therefore, that of the appraiser, not Urnikis-Negro.

One of the key aspects of a real estate appraisal is to determine appropriate "comparables" (comparable properties). The associate appraiser would include in his or her report delivered to AFPS a selection of comparable properties, as well as the adjustments necessary to determine a value for the property being

appraised. The selection of comparables involves the exercise of judgment. Urnikis-Negro's job duties did not involve selection of comparables. That was the responsibility of the associate appraiser and/or a certified appraiser, and Urnikis-Negro did not work in either of those roles for AFPS.

The evidence showed that on occasion, Urnikis-Negro suggested possible comparables to associate or certified appraisers after reviewing their reports and, in doing this, may have consulted computerized Multiple Listing Service databases to which AFPS had access. On these occasions, however, the appraiser made the decision whether to adopt Urnikis-Negro's suggestion and retained the sole discretion to determine what comparables to include in the report. Urnikis-Negro's role in these situations was merely to suggest the use of a different comparable. There was no credible evidence that she ever inserted a comparable into an appraisal on her own or, for that matter, that she made any changes in an appraisal without being told or asked to do so by the appraiser. And, in any event, the occasions on which Urnikis-Negro made suggestions regarding comparables were infrequent and did not constitute a significant portion of her work. Nor was this what Lash or AFPS had hired Urnikis-Negro to do.

In sum, neither AFPS nor Todd Lash hired Urnikis-Negro to exercise judgment or discretion in connection with appraisals or otherwise. Rather, Lash and the company expected her, with regard to appraisal reports, to perform only the essentially

ministerial function of reviewing the completeness and internal consistency of draft appraisal reports, and to note for the appraiser areas in which Lash or the lender might question the report.

In situations when Urnikis-Negro was reviewing a draft appraisal report prepared by an associate appraiser, a certified appraiser (usually Todd Lash, but not always) also had to approve the report – typically because the lender that had retained AFPS expected this. Lash, who reviewed such reports before approving them, gave Urnikis-Negro authorization to affix his signature to appraisal reports electronically.[2] When Urnikis-Negro did this, she acted only based on Lash's authorization; she did not have the authority to affix his signature to an appraisal without such authorization. The Court notes that it appears to have been a relatively common occurrence for Urnikis-Negro to affix Lash's electronic signature to appraisal reports on which a box was checked off stating that Lash had inspected the property, when in fact he had not done so. This occurred in situations in which the particular lender required that a certified appraiser inspect the property. It appears that the check-off of this box on the report may have been a "default" in the computer program AFPS used to prepare reports. Lash admitted at trial that he knew

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[2] On occasion, Urnikis-Negro similarly would affix the electronic signature of another certified appraiser doing work for AFPS, again with the appraiser's permission following his or her approval of the report.

this was occurring – in other words, that he knew false statements were being made under his name to these particular lenders. It is a reasonable inference that Urnikis-Negro acted at Lash's direction in this regard.

Urnikis-Negro had no assigned job title. She referred to herself, on occasion, as quality control manager, compliance director, or similar titles. In the Court's view, Urnikis-Negro did this in a self-aggrandizing way to portray herself as a trusted professional, not because Todd Lash or anyone had given her any such title.

Urnikis-Negro became a licensed associate appraiser in the late summer of 2005. She did not, however, perform any appraisal duties for AFPS and was never asked to do so by Todd Lash or anyone else at the company.

AFPS had a relatively penurious vacation pay policy. AFPS employees were entitled to no paid vacation during their first year of work and five days of paid vacation their second year. Urnikis-Negro's first year of work sometime in July 2005, and she earned five vacation days at that point, to be used over the following year. She used all five days during the month of July 2005. Later in 2005, Urnikis-Negro indicated that she believed she had additional paid vacation time coming but was advised that she had used all her accrued time for the year. Her next five paid vacation days would not be earned until she completed her second year, in July 2006. Because

Urnikis-Negro did not work for AFPS that full year, she never earned additional vacation time beyond the five days she had already used.

AFPS terminated Urnikis-Negro a few days before the end of 2005. The volume of the company's business had dropped significantly, and it either no longer needed or could no longer afford her services. The fact that the company learned Urnikis-Negro was interviewing for a new job may have had something to do with the timing of her termination. The specific reason for the termination, however, is not a material issue in this case.

Discussion

The Fair Labor Standards Act requires an employer to pay an employee one and one-half times the employee's regular rate for any hours worked in excess of forty hours per week. 29 U.S.C. §§ 207(a)(1). Employees who are "employed in a bona fide . . . administrative . . . capacity," as that term is defined by the Secretary of Labor, are exempt from the FLSA's overtime requirements. *Id.* § 213(a)(1). Because Congress delegated to the Secretary of Labor the authority to define the scope of the exemption, the Secretary's regulations providing that definition have the force of law. *Piscione v. Ernst & Young, LLP*, 171 F.3d 527, 532 (7th Cir. 1999). The Secretary has also published interpretative guidelines, which do not have the force of binding law but nonetheless are useful as persuasive evidence of the legislative and

regulatory intent. *See Shaw v. Prentice Hall Computer Publ'g, Inc.*, 151 F.3d 640, 642 (7th Cir. 1998).

Urnikis-Negro began working at AFPS in July 2004. Prior to August 23, 2004, an employee was considered to be employed in a bona fide administrative capacity when the employee's (1) "compensat[ion] [was] on a salary or fee basis at a rate of not less than $ 250 per week," (2) her "primary duty consist[ed] of either the performance of nonmanual work directly related to management policies or general business operations of the employer or the employer's customers," and (3) the "performance of such primary duty includes work requiring the exercise of discretion and independent judgment." Former 29 C.F.R. § 541.214 (2003 version). As of August 23, 2004, an employee satisfies the administrative exemption when her (1) "[c]ompens[ation] [is] on a salary basis at a rate of not less than $ 455 per week," (2) her "primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers," and (3) her "primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200.

The amended version of the regulatory definition does not apply retroactively. *See Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865, 870 (7th Cir. 2008); *Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 369 (7th Cir. 2005). That said, the August 2004 version of the regulation does not substantively alter the former test. *See Roe-Midgett*, 512 F.3d at 870; *see also,*

Darveau v. Detecon, Inc., 515 F.3d 334, 338 (4th Cir. 2008). For this reason, because Urnikis-Negro worked for AFPS for only about one month before the August 2004 regulation took effect, and for the sake of simplicity, the Court will apply the more recent new version of the regulation.

The administrative exemption is an affirmative defense on which the employer bears the burden of proof. *Roe-Midgett,* 512 F.3d at 869; *Kennedy*, 410 F.3d at 370. The exemption, like others in the FLSA, is construed narrowly. *See Demos v. City of Indianapolis*, 302 F.3d 698, 701 (7th Cir. 2002). The Seventh Circuit has made it clear, however, that this principle of statutory construction is essentially "a tie breaker," and that the employer does not bear any sort of enhanced burden of proof beyond the normal preponderance-of-the-evidence burden. *See Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 507-08 (7th Cir. 2007).

There is no question that Urnikis-Negro's work involved "matters of significance," as the performance of appraisals was the core function of AFPS's business. *See Roe-Midgett*, 512 F.3d at 871. The primary issue in this case is whether her duties involved "the exercise of discretion and independent judgment."

The Secretary's interpretive guidelines regarding the administrative exemption state:

(a) To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

(b) The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior

approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the policies formulated by the credit manager of a large corporation may be

subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is submitted to the client.

(d) An employer's volume of business may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. See also § 541.704 regarding use of manuals. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician."

(f) An employee does not exercise discretion and independent judgment with respect to matters of significance merely

> because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

29 C.F.R. § 541.202.

As the interpretive guideline states, an employee typically is considered to exercise discretion and independent judgment only if she compares and evaluates possible courses of conduct and then makes a decision. 29 C.F.R. § 541.202(a); *see Piscione*, 171 F.3d at 535. Without this limitation, nearly every worker would meet the "discretion" requirement, because nearly every worker exercises some form of judgment depending on how broadly that term is understood. *Clark v. J.M. Benson Co.*, 789 F.2d 282, 287-88 (4th Cir. 1986).

The Court has found that Urnikis-Negro did not make decisions about appraisals (or otherwise) and did not have the authority to do so. Rather, she essentially proofread or checked the work of others and pointed out possible errors and omissions. In a

small number of situations, she made suggestions to the appraiser regarding comparable properties. That, however, was not part of her job and was not what she was hired to do. Urnikis-Negro essentially took it upon herself to make these suggestions. The appraisers had sole control over the content of their reports and were entirely free to ignore or reject her suggestions. There is no indication that her suggestions carried any weight whatsoever.

The Secretary's interpretive guidelines, quoted in full above, say that "the exercise of discretion and independent judgment implies a freedom from immediate direction or supervision." 29 C.F.R. § 541.202(c). That said, an employee can still exercise discretion though her decisions are subject to a superior's review or reversal. *Id.* Thus, the fact that work of the employee in *Haywood,* who investigated, negotiated, and settled customer complaints, was reviewed by her supervisors did not defeat her exempt status. *Haywood,* 121 F.3d at 1073. But in *Haywood,* the employee actually made decisions; it appears that the supervisory review was done after-the-fact. By contrast, the evidence in the present case reflected that Urnikis-Negro did not make decisions; she made only suggestions after spotting potential issues.

Urnikis-Negro's work satisfies, at most, one of the ten factors identified in 29 C.F.R. § 541.202(b): she carried out what arguably were major assignments. There is no evidence that she had the authority to formulate, interpret, affect, or implement management policies or practices; to commit AFPS in

significant matters; to waive or deviate from established procedures without prior approval; to negotiate or bind the company on significant matters; to provide consultation or expert advice to AFPS management; to plan corporate business objectives; to investigate or resolve significant matters on management's behalf; or to represent AFPS in handling complaints, disputes, or grievances. A straight-faced argument can be made that her work "affect[ed] business operations to a substantial degree," because appraisals were the core function of AFPS. In fact, however, Urnikis-Negro she was doing little more than double-checking the work done by those whose responsibilities *actually did* affect the company's operations – namely, the appraisers. Though the ten factors cited in the regulation are non-exclusive, and there is no minimum number that an employee must meet to be considered subject to the administrative exemption, the Court cannot conclude that an employee who, like Urnikis-Negro, only arguably fit within one or two of those factors has been proven to be exempt from the FLSA's requirements.

For these reasons, the Court concludes that defendants have not met their burden of proof that Urnikis-Negro is subject to the FLSA's administrative exemption, the only exemption claimed to apply. Urnikis-Negro was entitled to be paid compensation for overtime above and beyond her regular pay. She has proven the defendants liable under both the FLSA and under the Illinois Minimum Wage Law's parallel provisions.

Urnikis-Negro has also proven by a preponderance of the evidence that defendants acted with reckless disregard of her rights and their obligations under the FLSA in failing to pay her overtime compensation. This entitles her to recover unpaid overtime for up to three years prior to the date she filed suit, a period that encompasses the entire term of her employment at AFPS. *See* 29 U.S.C. § 255(a); *Bankston v. State of Illinois*, 60 F.3d 1249, 1253 (7th Cir. 1995) (reckless disregard amounts to willfulness under FLSA). As stated earlier, Lash's deposition testimony evinced an awareness of the requirement to pay employees extra for hours worked in excess of forty per week. The evidence also showed that he and AFPS rather routinely disregarded their legal obligations vis-a-vis employee pay (e.g., tax withholding and payment of Social Security taxes), not to mention vis-a-vis certain lenders that retained AFPS (by making false statements regarding whether the appraiser had inspected the property).

Urnikis-Negro has not, however, shown by a preponderance of the evidence that defendants failed to pay her vacation pay that she was owed. As the Court has found, under established AFPS policy, Urnikis-Negro had not earned the additional vacation time she claims.

Damages

Urnikis-Negro contends she is entitled to be compensated for 2,508.75 hours of overtime work at

the rate of time-plus-one-half. She contends her regular hourly wage rate was $ 25.00 per hour, calculated by dividing her regular weekly pay of $ 1,000 by forty, and thus her rate for overtime pay rate is $ 37.50 per hour.

Urnikis-Negro provided what she claimed were conservative estimates during her testimony on direct examination. During the entire time she worked at AFPS, she stated, she essentially worked non-stop from the time she arrived at work to the time she left, without leaving – whether to go home, to take lunch, or for other purposes. Urnikis-Negro testified that for her first eight or so months at AFPS – the thirty-two weeks from her hire date through the end of February 2005 – she typically arrived at work at 7:00 a.m. and left work at 12:30 a.m. Monday through Thursday (and at times, she says, she worked even longer). On Fridays during this period, Urnikis-Negro testified, she arrived at work at 6:00 a.m. and left at 8:00 p.m. Her work week from Monday through Friday thus totaled eighty-four hours. She also testified that she worked one weekend day every second week.

From March through June 2005, Urnikis-Negro testified, her workload was slightly lower. She testified that during this seventeen week period, she worked from 8:00 a.m. through 10:00 p.m. Monday through Thursday and 6:00 a.m. through 7:00 p.m. Friday, as well as one weekend day every second week.

From July through December 2005 (when she was terminated), Urnikis-Negro stated, the workload, and thus her work hours, decreased a bit more. She testified that during this twenty-six week period, she worked from 9:00 a.m. through 8:00 p.m. Monday through Thursday, and 8:00 a.m. through 6:00 p.m. Friday, as well as one weekend day every second week.

The Court found Urnikis-Negro's work-hour testimony significantly exaggerated and largely lacking in credibility. First, her testimonial description of her work hours exceeded, albeit to a modest degree, specific allegations she made in the complaint she filed in this case. In addition, to believe Urnikis-Negro, one would have to believe that she left her two middle-school-age children [3] at home alone every day both before and after school (and on non-school days during summer and other periods) and during the evening, without taking them to school, picking them up, or ever leaving the work site to check in on them. The Court did not find this testimony believable. The most Urnikis-Negro could say in this regard was that she left it to a male friend from AFPS, a person she had only recently met (at least in the early stage of her work) to look in on her children from time to time. The Court did not find that this plausibly described the state of affairs during the relevant period.

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[3] By the time Urnikis-Negro was terminated, one of her children had reached the ninth grade of school.

Urnikis-Negro's credibility was also impeached in other significant ways not directly related to her work-hour testimony. For these reasons, and based on the Court's observation of her demeanor, the Court finds Urnikis-Negro's testimony insufficient to establish the number of unpaid overtime hours she worked.

The Court has no doubt, however, that Urnikis-Negro typically worked well over forty hours per week. This determination is supported by evidence regarding the overall volume of AFPS's business during the relevant period, the testimony of Patricia Lash (Todd Lash's mother) that Urnikis-Negro typically was already at work with Patricia arrived, and other evidence submitted at trial, including elements of Urnikis-Negro's testimony that the Court credits. Even though some of this evidence was introduced by the defense, it is well established that in determining whether a plaintiff has met her burden of proof, a fact finder may consider all the evidence, no matter who introduced it. *See, e.g.*, Seventh Cir. Pattern Civil Jury Instruction 1.09; *see also, Hernandez v. Cowan*, 200 F.3d 995, 998 (7th Cir. 2000) (applying this principle to a criminal case).

The Court is left to determine by inference and circumstantial evidence how many overtime hours Urnikis-Negro worked. That does not defeat her entitlement to recover damages. Though damages may not be based entirely on speculation, a plaintiff need only prove her damages to a reasonable degree of certainty. *See, e.g., R.E. Davis Chemical Corp. v.*

Diasonics, Inc., 924 F.2d 709, 712 (7th Cir. 1991) (breach of contract case); *see generally*, *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-63, 51 S. Ct. 248, 75 L. Ed. 544 (1931).

The Court finds that it is more probable than not (that is, by a preponderance of the evidence) that Urnikis-Negro typically arrived at work about 8:15 a.m., after dropping off one of her children at school, except for the period from July through December 2005, when, as she testified, she arrived later, around 9:00 a.m. The Court also finds that she typically left work in the afternoon for a period around the time her children left school, and then returned to work, leaving work for good later in the evening. There is no basis to believe that Urnikis-Negro's average work hours varied from this during periods when school was not in session.

The Court therefore determines that Urnikis-Negro worked, on average, twelve hour days five days per week from her start date through the end of June 2005, and ten hour days from July through December 2005, a period during which the volume of work at AFPS had dropped somewhat. The Court also found persuasive Urnikis-Negro's testimony that she typically worked approximately six and one-half hours every second weekend throughout the relevant period.

Based on these findings, the Court determines that Urnikis worked the following number of hours per week during the relevant period:

– July 2004 through June 2005 (49 weeks):
24 weeks at 66.5 hours
25 weeks at 60 hours

– July 2005 through December 2005 (27 weeks):
14 weeks at 50 hours
13 weeks at 56.5 hours

Urnikis-Negro contends she is entitled to be compensated for all time worked over forty hours per week at the rate of $ 37.50 per hour. The Court disagrees and concludes that the "fluctuating hours" method of calculating overtime pay is the appropriate methodology in this case to determine the amount of unpaid overtime. Under Department of Labor regulations,

> [a]n employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those

> workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

29 C.F.R. § 778.114(a). In this case, the credible evidence showed that, as required by the regulation, there was a "clear mutual understanding" between Urnikis-Negro and Todd Lash that her fixed salary of $ 1,000 per week or $ 52,000 per year was to serve as her compensation, apart from overtime premiums, for whatever number of hours she worked each week, rather than for working forty hours or some other fixed period. *See, e.g., Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 39-40 (1st Cir. 1999).

Based on the regulation and its illustrative example, the Court calculates the amount of overtime pay due to Urnikis-Negro as follows. *See generally*

Blackmon v. Brookshire Grocery Co., 835 F.2d 1135, 1138-39 (5th Cir. 1988). First, for the period from July 2004 through June 2005, Urnikis-Negro worked 24 weeks at 66.5 hours. For these weeks, her effective regular hourly rate was $ 15.00 per hour, and thus she is entitled to additional compensation of $ 7.50 for 26.5 hours in each of those 24 weeks. The total overtime compensation for these weeks is $ 4,770. Second, during that same period, Urnikis-Negro worked 25 weeks at 60 hours. For these weeks, her effective regular hourly rate was $ 16.66 per hour, and thus she is entitled to additional compensation of $ 8.33 for 20 hours in each of those 25 weeks. The total overtime compensation for these weeks is $ 4,165. Third, during the period from July 2005 through December 2005, Urnikis-Negro worked 14 weeks at 50 hours. For those weeks, her effective hourly rate was $ 20 per hour, and thus she is entitled to additional compensation of $ 10 for 10 hours in each of those 14 weeks. The total overtime compensation for these weeks is $ 1,400. Fourth, during that same period, Urnikis-Negro worked 13 weeks at 56.5 hours. For those weeks, her effective hourly rate was $ 17.70 per hour, and thus she is entitled to additional compensation at 8.85 for 16.5 hours in each of those 13 weeks. The total overtime compensation for these weeks is $ 1,898.

In sum, the Court finds that the total amount of overtime compensation due to Urnikis-Negro as a result of defendants' violation of the FLSA is $ 12,233 ($ 4,770 + $ 4,165 + $ 1,400 + $ 1,898). She is also

entitled to liquidated damages in an equal amount. Liquidated damages are presumptively available when the FLSA is violated. *See, e.g,. Bankston,* 60 F.3d at 1254. There is no indication that the defendants acted reasonably or in good faith in failing to pay overtime wages; rather, the defendants recklessly disregarded their obligations under this statute, just as they sought to flout their obligations under the income tax withholding and Social Security laws. Thus, the Court awards plaintiff damages in the total amount of $ 24,466 and will enter judgment in that amount as to Counts 1 and 2.

Urnikis-Negro is also entitled to an award of attorney's fees and costs. *See* 29 U.S.C. § 216(b). Pursuant to the Court's authority under Local Rule 54.3(b), the Court will shorten the time for compliance with Rule 54.3, as set forth below.

Conclusion

For the reasons stated above, the Court directs the Clerk to enter judgment in favor of plaintiff and against all defendants on Counts 1 and 2 in the amount of $ 24,466 on each count (these amounts are cumulative), and in favor of defendants on Count 3.

Plaintiff's disclosures under Rule 54.3(d)(1-3) are to be made by July 31, 2008; defendants' disclosures under Rule 54.3(d)(5) are to be made by August 11, 2008; the joint statement under Rule 54.3(e) and plaintiff's motion under Rule 54.3(f), if any, are to be filed by August 25, 2008; defendants' response to the

motion is to be filed by September 8, 2008; and plaintiff's reply is to be filed by September 15, 2008. The Court sets the matter of attorney's fees and costs for ruling on September 22, 2008 at 9:30 a.m.

/s/ Matthew F. Kennelly
MATTHEW F. KENNELLY
United States District Judge

Date; July 21, 2008

Overtime Payments Per Hour of Overtime For A Worker Earning $1,000 For A 40 Hour Week			
Hours Worked	Seventh Circuit Calculated Payment	Seventh Circuit Payment As A Percentage of Straight Rate	Seventh Circuit Payment As A Percentage of Time And A Half Rate
41	$12.20	48.78%	32.52%
42	$11.90	47.62%	31.75%
43	$11.63	46.51%	31.01%
44	$11.36	45.45%	30.30%
45	$11.11	44.44%	29.63%
46	$10.87	43.48%	28.99%
47	$10.64	42.55%	28.37%
48	$10.42	41.67%	27.78%
49	$10.20	40.82%	27.21%
50	$10.00	40.00%	26.67%
51	$9.80	39.22%	26.14%
52	$9.62	38.46%	25.64%
53	$9.43	37.74%	25.16%
54	$9.26	37.04%	24.69%
55	$9.09	36.36%	24.24%
56	$8.93	35.71%	23.81%

57	$8.77	35.09%	23.39%
58	$8.62	34.48%	22.99%
59	$8.47	33.90%	22.60%
60	$8.33	33.33%	22.22%
61	$8.20	32.79%	21.86%
62	$8.06	32.26%	21.51%
63	$7.94	31.75%	21.16%
64	$7.81	31.25%	20.83%
65	$7.69	30.77%	20.51%
66	$7.58	30.30%	20.20%
67	$7.46	29.85%	19.90%
68	$7.35	29.41%	19.61%
69	$7.25	28.99%	19.32%
70	$7.14	28.57%	19.05%